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U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY OF SAN JOSE, CALIFORNIA,
STATE OF CALIFORNIA,
and A.J. RAISCH PAVING CO.,

Defendant.

Case No. C 91-20337 JW

ORDER FOR ENTRY OF
CONSENT DECREE

This Court has reviewed the proposed consent decree, the motion and supporting materials for entry of the decree, the comments and the United States' responses thereto, and any other materials submitted with respect to this matter. After consideration, this Court finds that the proposed consent decree is fair, reasonable, and consistent with the purposes of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607.


90-11-2-353

DEPARTMENT OF JUSTICE
OCT 2 - 1991
LANDS DIVISION
ENFORCEMENT RECORD 42

1 THEREFORE, IT IS HEREBY ORDERED that the proposed Consent
2 Decree, lodged with this Court on June 7, 1991, is entered as an
3 Order of this Court.

4 IT IS SO ORDERED.

5
6 Dated: October 28, 1991


HONORABLE JAMES WARE
United States District Judge

1
2 RICHARD B. STEWART
3 Assistant Attorney General
4 Environment and Natural Resources Division
5 United States Department of Justice

6 LESLIE ALLEN
7 Environmental Enforcement Section
8 Environment and Natural Resources Division
9 United States Department of Justice
10 P.O. Box 7611
11 Washington, D.C. 20044-7611
12 Telephone: (202) 314-4114

13 MICHAEL D. ROWE
14 Environmental Defense Section
15 Land and Natural Resources Division
16 United States Department of Justice

17 WILLIAM T. MCGIVERN, JR.
18 United States Attorney
19 PATRICK RAMIREZ S. BUPARA
20 Assistant United States Attorney
21 450 Golden Gate Avenue
22 P.O. Box 36055
23 San Francisco, California 94102
24 Telephone: (415) 556-5132

25 NANCY J. MARVEL
26 Regional Counsel
SHAUNA WOODS
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 9
1235 Mission Street
San Francisco, California 94103
Telephone: (415) 556-5873

ATTORNEYS FOR PLAINTIFF
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
Plaintiff,	)	Civ. #89-
)	
v.)	
	)	Consent Decree
CITY OF SAN JOSE, CALIFORNIA;)	
A.J. RAISCH PAVING CO.,)	
)	
Defendants.)	

CONSENT DECREE - 1 -

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JUN 7 - 1991

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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1	<u>RECITALS</u>4
2		
3	I. <u>JURISDICTION</u>7
4	II. <u>DEFINITIONS</u>7
5	III. <u>PURPOSE</u>	11
6	IV. <u>BINDING EFFECT</u>	12
7	V. <u>RD/RA WORK TO BE PERFORMED</u>	13
8	VI. <u>RESTORATION AND MITIGATION WORK TO BE</u> <u>PERFORMED</u>	24
9	VII. <u>PROCEDURE FOR DELIVERABLES</u>	40
10	VIII. <u>QUALITY ASSURANCE</u>	42
11	IX. <u>PROJECT COORDINATORS</u>	43
12	X. <u>SITE ACCESS</u>	44
13	XI. <u>SAMPLING AND INVESTIGATION</u>	46
14	XII. <u>ASSURANCE OF ABILITY TO COMPLETE WORK</u>	48
15	XIII. <u>COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS</u>	49
16	XIV. <u>RETENTION OF RECORDS</u>	50
17	XV. <u>REIMBURSEMENT OF PAST AND OVERSIGHT COSTS</u>	51
18	XVI. <u>RESERVATIONS AND WAIVERS OF RIGHTS</u>	54
19	XVII. <u>COVENANT NOT TO SUE</u>	56
20	XVIII. <u>DE MINIMIS SETTLEMENT CONCERNING AREAS D-1, D-2,</u> <u>AND TRUCKYARDS</u>	59
21	XIX. <u>CONTRIBUTION PROTECTION</u>	62
22	XX. <u>STIPULATED PENALTIES</u>	63
23	XXI. <u>DISPUTE RESOLUTION</u>	66
24	XXII. <u>FORCE MAJEURE</u>	69
25	XXIII. <u>ADDRESSES FOR NOTICE; SERVICE OF PROCESS</u>	70
26	XXIV. <u>MODIFICATION</u>	71

CONSENT DECREE - 2 -

1	XXV. <u>ADMISSIBILITY OF DATA</u> . . . . .	.72
2	XXVI. <u>COMMUNITY RELATIONS</u> . . . . .	.72
3	XXVII. <u>PUBLIC PARTICIPATION</u>. . . . .	.72
4	XXVIII. <u>CONSISTENCY WITH THE NCP</u>. . . . .	.73
5	XXIX. <u>INDEMNIFICATION OF THE UNITED STATES</u>. . . . .	.73
6	XXX. <u>OTHER CLAIMS</u>. . . . .	.74
7	XXXI. <u>CONTINUING JURISDICTION</u> . . . . .	.74
8	XXXII. <u>SECTION 121(C) PERIODIC REVIEW</u>. . . . .	.75
9	XXXIII. <u>EFFECTIVE DATE</u>. . . . .	.75
10	XXXIV. <u>CERTIFICATION OF WORK AND TERMINATION OF DECREE</u>. . . .	.76
11	XXXV. <u>SECTION HEADINGS</u> . . . . .	.79

13 APPENDIX A: Record Of Decision, Ring Levee Operable Unit,
14 South Bay Asbestos Area Superfund Site,
September 1988

15 APPENDIX A-1: Record of Decision Amendment

16 APPENDIX B: Ring Levee Removal Areas

17 EXHIBIT A: Map of Levee Removal Areas

18 EXHIBIT B: Map of Restoration and Mitigation Areas

19 EXHIBIT C: Map of Truckyards

RECITALS

WHEREAS Plaintiff, United States of America ("Plaintiff" or "United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), and the United States Army Corps of Engineers ("COE") filed a complaint, simultaneously with the lodging of this Consent Decree, pursuant to CERCLA and the CWA to compel Defendants City of San Jose, California ("City" or "San Jose") and A. J. Raisch Paving Co. ("Raisch") to perform Remedial Design and Remedial Action ("RD/RA") pursuant to CERCLA and the Record of Decision, as modified, (ROD) (Appendix A and A-1), to mitigate associated impacts to the wetlands and to recover all Response Costs that have been and will be incurred by the United States in response to releases and threatened releases of hazardous substances from the facility known as the Ring Levee Site;

WHEREAS San Jose constructed the ring levee in 1983 during a flood as an interim measure;

WHEREAS the levee was constructed from soil containing naturally occurring serpentine asbestos fibers; Raisch and others supplied the material for the levee to San Jose;

WHEREAS in 1986, EPA began applying a polymer dust suppressant to the levee to prevent releases to the environment of asbestos fibers from the levee; in 1988, San Jose entered into Administrative Consent Order No. 88-15 with EPA, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), in which San Jose agreed to continue the polymer spraying operation. Acting

CONSENT DECREE - 4 -

1. pursuant to that Order, San Jose sprayed the levee with polymer
2 in July, 1988 and again in October 1989;

3 WHEREAS the South Bay Asbestos Area Site is listed on the
4 National Priorities List pursuant to CERCLA § 105, 42 U.S.C.
5 § 9605, and the Ring Levee Site is an Operable Unit of the South
6 Bay Asbestos Area Site;

7 WHEREAS on September 29, 1988, EPA signed a ROD selecting a
8 vegetative soil cover remedy for the Ring Levee Operable Unit of
9 the South Bay Asbestos Area, but the ROD stated that removal of
10 the levee would be acceptable to EPA as an alternative remedy if
11 potentially responsible parties would agree to carry out the
12 removal; this Consent Decree documents the Defendants' agreement
13 to remove the ring levee; EPA will release a new proposed plan
14 which documents the differences between the remedy described in
15 the September 1988 ROD and the remedy proposed by the Defendants
16 and embodied in this Decree. After a public notice and comment
17 period, and prior to moving for entry of this Decree, EPA will
18 issue a ROD amendment. After it has been signed by EPA, the ROD
19 amendment will be attached as Appendix A-1 to this Decree;

20 WHEREAS the areas depicted as D-1 and Truckyards on the maps
21 attached as Exhibits A and C, respectively, were areas of pre-
22 existing high ground prior to the construction of the Levee and
23 the area depicted as D-2 on the map attached as Exhibit A
24 represents the original configuration of the Levee which the City
25 scraped and removed in 1983; and EPA has determined that Raisch's
26 and the City's contribution of hazardous substances to Areas D-1

CONSENT DECREE - 5 -

1 and D-2, and the truckyard areas adjacent to the Ring Levee is
2 limited to asbestos-contaminated fill material they supplied for
3 construction of the ring levee, which may have come to be located
4 in the D-1, D-2, or truckyard areas;

5 WHEREAS EPA has determined that (1) Raisch's and the City's
6 contribution of hazardous substances to the D-1, D-2, or
7 truckyard areas, if any, is minimal in comparison to other
8 hazardous substances in these areas; (2) the toxic or other
9 hazardous effects of the hazardous substances contributed, if
10 any, do not contribute disproportionately to the cumulative toxic
11 or other hazardous effects of the hazardous substances at the D-
12 1, D-2, and truckyard areas; and (3) the de minimis settlement
13 set forth in Section XVIII involves only a minor portion of the
14 estimated response costs that have been and will be incurred at
15 the D-1, D-2, and truckyard areas;

16 WHEREAS the ring levee, or portions thereof, was constructed
17 in wetlands, which are "waters of the United States" within the
18 meaning of 33 U.S.C. § 1362(7) and regulations promulgated there-
19 under;

20 WHEREAS the Department of the Interior, as the Natural
21 Resource Trustee, has determined that the mitigation and
22 restoration activities set forth in Section VI of this Decree, if
23 performed in accordance with the terms of this Decree, will
24 adequately restore any natural resources that have been damaged
25 by the existence of the ring levee and that therefore a covenant
26 not to sue for natural resource damages is appropriate;

CONSENT DECREE - 6 -

1 WHEREAS EPA has conferred with the State of California in
2 accordance with Section 121(f) of CERCLA;
3

4 WHEREAS Defendants have agreed to the making and entry of
5 this Consent Decree, pursuant to CERCLA § 122, 42 U.S.C. § 9622,
6 prior to the taking of any testimony, based upon the complaint
7 filed in the case, without any admission of liability or fault,
8 and the Parties agree that settlement of this matter and entry of
9 this Consent Decree is made in good faith in an effort to avoid
10 further expense and protracted litigation;

11 WHEREAS EPA has determined that the settlement of this case
12 is practicable and in the public interest,

13 NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS
14 FOLLOWS:

15 I. JURISDICTION

16 (A.) The Court has jurisdiction over the subject matter of
17 this Consent Decree pursuant to Sections 106, 107, and 113 of the
18 Comprehensive Environmental Response, Compensation, and Liability
19 Act, ("CERCLA"), 42 U.S.C. §§ 9606, 9607 and 9613, and Section
20 309 of the Federal Water Pollution Control Act, ("CWA"), 33
21 U.S.C. § 1319, and 28 U.S.C. §§ 1331 and 1345.

22 (B.) Defendants do not contest and agree not to contest the
23 jurisdiction of the United States to maintain this action or the
24 Court's jurisdiction to enter and enforce this Consent Decree.

25 II. DEFINITIONS

26 The following definitions shall apply to this Consent
Decree:

CONSENT DECREE - 7 -

1 (A.) CERCLA means the Comprehensive Environmental Response,
2 Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq., as
3 amended by the Superfund Amendments and Reauthorization Act of
4 1986, Public Law 99-499.

5 (B.) The City of San Jose ("City") means the City of San
6 Jose, California, including the area of San Jose known as
7 "Alviso."

8 (C.) Completion of the Coyote Creek Flood Control Project
9 means the completion of the improvement of the Coyote Creek from
10 the San Francisco Bay to Montague Expressway to carry the 100
11 year flood flows. The project will be deemed complete upon the
12 issuance of a notice of completion by the Santa Clara Valley
13 Water District, which is the lead agency for this project. It is
14 presently anticipated that the project will be completed by the
15 fall of 1994.

16 (D.) Hazardous Substances shall have the meaning set forth
17 by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

18 (E.) The National Contingency Plan (NCP) means the plan
19 promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605,
20 and codified at 40 C.F.R. Part 300, as amended.

21 (F.) Oversight means the United States' and its contrac-
22 tors' review, inspection, analysis and verification of remedial
23 Work and reports of the Defendants as required under the terms of
24 this Consent Decree.

25 (G.) Parties means all parties who are signatories to this
26 Consent Decree.

1 (H.) A. J. Raisch Paving Co. (Raisch) shall include A. J.
2 Raisch Paving Co., Raisch Products, Inc., and Raisch Equipment
3 Co.

4 (I.) Record of Decision (ROD) means the document, signed by
5 the EPA Region IX Regional Administrator on September 29, 1988,
6 describing the remedy selected by EPA for cleanup of the Ring
7 Levee Site (which is attached as Appendix A), and the amendment
8 selecting the remedy of removal of the ring levee (which
9 amendment will be attached as Appendix A-1 after its issuance).

10 (J.) Release shall be used as that term is defined in
11 Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

12 (K.) Remedial Action (RA) means the implementation of the
13 Remedial Design consistent with the NCP and EPA Superfund
14 Remedial Design and Remedial Action Guidance, including on-site
15 construction, treatment processes, removal, grading, and any
16 other tasks necessary to effectuate the requirements set forth in
17 the ROD.

18 (L.) Remedial Design (RD) means all Work undertaken to
19 design the technical aspects of the remedial activities to be
20 implemented at the Site.

21 (M.) Removal shall mean the removal of ring levee material
22 and shall not have the meaning set forth in Section 101(23) of
23 CERCLA, 42 U.S.C. § 9601(23).

24 (N.) Response Costs means all costs, including but not
25 limited to, administrative, enforcement, investigative, over-
26 sight, access, removal and remedial costs, incurred by EPA and

1 the Department of Justice (DOJ) in connection with the response
2 taken by the EPA at the Site pursuant to CERCLA.

3 (O.) The Ring Levee Site ("Site," or "Facility") means the
4 ring levee, constructed by the City of San Jose in 1983 and
5 located in the community of Alviso. A map of the Ring Levee Site
6 is attached as Exhibit A. The Ring Levee Site does not include
7 the areas on Exhibit A labeled D-1 or D-2 or the areas identified
8 as "truckyards" on Exhibit C.

9 (P.) The South Bay Asbestos Area means the South Bay
10 Asbestos CERCLA site as listed on the National Priorities List
11 pursuant to CERCLA § 105, 42 U.S.C. § 9605.

12 (Q.) The United States, or Plaintiff, means the United
13 States, including any and all departments, agencies, officers,
14 administrators, and representatives thereof.

15 (R.) Wetlands means diked, seasonal wetlands similar to
16 wetlands of New Chicago Marsh adjacent to the Ring Levee Site.
17 In general, seasonal wetlands are ponded or inundated by water
18 during the rainy season (November through April) and dry during
19 the summer months. The extent of ponding on seasonal wetlands
20 will vary from year to year, partially depending on precipitation
21 levels. Most of the New Chicago Marsh is shown on the United
22 States Fish and Wildlife Service (FWS) 1985 National Wetland
23 Inventory Map, Milpitas, California, as seasonally flooded,
24 meaning that surface water is present for extended periods
25 especially early in the growing season, but is absent by the end
26

1 of the season in most years. When surface water is absent, the
2 water table is often near the land surface.

3 (S.) All terms not defined herein shall have the definition
4 set forth in CERCLA or other applicable statute or regulation or
5 if not defined therein, they shall have their ordinary meaning.
6

7 III. PURPOSE

8 (A.) The purpose of this Consent Decree is to serve the
9 public interest by providing for the:

10 (1.) protection of the public health, welfare, and the
11 environment from releases and threatened releases of hazardous
12 substances from the ring levee by implementation of the RD/RA as
13 set out in Section V (RD/RA Work to be Performed) of this Consent
14 Decree and in the ROD;

15 (2.) reimbursement of the Superfund for Response Costs
16 incurred, and to be incurred, by EPA and DOJ in connection with
17 the Ring Levee Site pursuant to Section XV; and

18 (3.) mitigation of any negative wetland impacts caused
19 by the levee as set out in Section VI (Wetlands Restoration and
20 Mitigation Work to be Performed) of this Consent Decree.

21 (B.) The RD/RA is intended to implement the ROD. The RD/RA
22 shall meet the substantive standards of all "applicable re-
23 quirements" and "relevant and appropriate requirements" (ARARs)
24 as set forth in Section 121(d) of CERCLA, 42 U.S.C. § 9621(d),
25 the NCP, and any applicable EPA policies and guidances.
26

1
2 IV. BINDING EFFECT

3 (A.) Each undersigned representative of the parties to the
4 Consent Decree certifies that he or she is fully authorized to
5 enter into the terms and conditions of this Decree and to execute
6 and legally bind such party to this document.

7 (B.) This Consent Decree shall apply to and be binding upon
8 Defendants, their successors, and assigns, and upon the United
9 States.

10 (C.) Defendants agree to provide a copy of this Consent
11 Decree, as lodged, along with all relevant additions and
12 modifications to this Consent Decree, to each person, including
13 all contractors and subcontractors, retained to perform the Work
14 contemplated by this Decree, within 30 days of retainer, and
15 shall condition any contract for the Work on compliance with this
16 Consent Decree.

17 (D.) Defendants agree that they are jointly and severally
18 liable for compliance with all provisions of this Decree except
19 the provisions of Section VI relating solely to wetland
20 mitigation and restoration.

21 (E.) San Jose agrees to accept responsibility for
22 performing the Wetlands Mitigation and Restoration Work as set
23 out in Section VI of this Decree.

24 V. RD/RA WORK TO BE PERFORMED

25 (A.) Defendants shall, at their own expense, remove and
26 dispose of the ring levee in accordance with the ROD and this
Consent Decree, subject to EPA oversight and approval. Following

CONSENT DECREE - 12 -

1 removal of the levee and completion of the Remedial Action, the
2 Ring Levee Site shall not exhibit the presence of asbestos in the
3 soil in an amount above one percent (1%) as detected by Polarized
4 Light Microscopy (PLM) analysis, as further set forth in
5 subsection (G.) (Removal and Grading Specifications), below. The
6 RD/RA Work, as set forth in this Section, including the
7 confirmation sampling pursuant to subsection (F.)(4.), shall be
8 completed by no later than August 31, 1995, or within one year
9 after Completion of the Coyote Creek Flood Control Project,
10 whichever comes first.

11 (B.) All Remedial Design Work to be performed by the
12 Defendants pursuant to this Consent Decree shall be under the
13 direction and supervision of Raisch and/or a qualified
14 professional architect or engineer. Before bids or proposals for
15 any such engineer or architect are solicited by the Defendants,
16 the Defendants shall submit to EPA in writing their bid
17 specifications or requests for proposals (RFPs) including
18 required qualifications and experience. Any engineer or
19 architect chosen by Defendants shall have such qualifications and
20 experience as have been approved by EPA. Prior to the initiation
21 of remedial design Work for the Site, the Defendants shall notify
22 EPA in writing, of the name, title, and qualifications of any
23 engineer or architect to be used in carrying out the remedial
24 design Work to be performed pursuant to this Consent Decree.

25 (C.) All Remedial Action Work to be performed by the
26 Defendants pursuant to this Consent Decree shall be performed by

1 Raisch and/or shall be under the direction and supervision of a
2 qualified professional engineer. Before bids or proposals for
3 any such professional engineer and any contract personnel are
4 solicited by the Defendants, the Defendants shall submit to EPA
5 in writing its bid specifications or requests for proposals
6 (RFPs) including required qualifications and experience for such
7 engineer and contract personnel. Any engineer or contract
8 personnel chosen by the City shall have such qualifications and
9 experience as have been approved by EPA. Prior to the initiation
10 of remedial action Work at the Site, the Defendants shall notify
11 EPA in writing, of the name, title, and qualifications of the
12 engineer, and the names of principal contractors and/or
13 subcontractors (including laboratories) to be used in carrying
14 out the Work to be performed pursuant to this Consent Decree.

15 (D.) The procedures set forth in subsections (B.) and (C.),
16 above, are intended to accommodate the constraints of the City's
17 bid solicitation and consultant selection processes. However,
18 EPA retains the right to disapprove any engineer, architect,
19 contractor, or other personnel selected by Defendants in
20 accordance with subsection (B.) or (C.) above. EPA shall notify
21 Defendants of any such disapprovals within 10 days of receipt of
22 the name(s) of any such personnel. Any such disapproval shall be
23 subject to the dispute resolution procedures of Section XXI and
24 shall constitute a force majeure event, and the provisions of
25 Section XXII shall apply.
26

1 (E.) As part of the Ring Levee Site remediation, Defendants
2 shall complete the following tasks as further delineated in this
3 Decree:

4 (1.) Design and Implementation. Defendants shall
5 design and implement, subject to EPA approval, a plan for proper
6 removal (including dust control measures during removal) and
7 disposal of the ring levee in accordance with the ROD and this
8 Consent Decree.

9 (2.) Dust Suppression.

10 (a.) Until commencement of the Remedial Action,
11 Defendants shall periodically apply a chemical dust suppressant
12 to the levee. Within 60 days of entry of this Decree, and prior
13 to the application of the dust suppressant, Defendants shall
14 submit a plan to EPA, subject to EPA approval, which identifies
15 the polymer to be used, describes the application method and
16 includes a schedule for inspection and application.

17 (b.) Subject to EPA's approval of the proposed plan
18 pursuant to subsection (2.)(a.), above, Defendants shall apply
19 the dust suppressant as needed, but not more than twice annually.
20 Defendants shall inspect the levee and dust suppressant material
21 at least once each quarter year and shall immediately repair any
22 damaged areas.

23 (c.) If Defendants decide to use a different dust
24 suppressant, they shall submit a revised plan to EPA, subject to
25 EPA approval, prior to the application of the new dust
26 suppressant.

1
2 (3.) Community Relations. Defendants shall inform the
3 residents of Alviso of the RD/RA progress, as set forth in the
4 Community Outreach Plan in subsection (F.) (6) below and as
5 required by Section XXVI (Community Relations) of this Decree.

6 (F.) Documents to be submitted ("Deliverables"):

7 (1.) RD/RA Work Plan. Within one year of the entry of
8 this Decree, Defendants shall submit a Work Plan to EPA for the
9 Remedial Design and Remedial Action at the Site (RD/RA Work
10 Plan). The RD/RA Work Plan: 1) shall provide a schedule for
11 implementation of the RD/RA, including a schedule for Defendant's
12 initial submittal of the deliverables described below (excluding
13 the Monthly and/or Quarterly Progress Reports); 2) shall include
14 a detailed outline of the contents of the deliverables required
15 pursuant to subsections (F.) (2.)-(8.), below; 3) shall include a
16 proposal for dust control measures to be taken during the removal
17 of the levee; and 4) shall designate which project coordinator
18 (i.e., City's or Raisch's) shall be the primary contact for the
19 various components of the Remedial Design and Remedial Action.
20 The schedule for the deliverables shall include fixed calendar
21 dates for the submittal of the Conceptual Design, the Quality
22 Assurance/Quality Control Plan, the Community Outreach Plan, and
23 the Worker Health and Safety Plan. For all other deliverables,
24 the schedule shall include dates that are described in terms of
25 specified time periods measured with relation to the Completion
26 of the Coyote Creek Flood Control Project. The RD/RA Work Plan
shall be developed in conformance with the ROD, this Consent

1 Decree, EPA Superfund Remedial Design and Remedial Action
2 Guidance, and any additional guidance documents provided to the
3 Defendants by EPA.
4

5 (2.) Remedial Design Reports. Defendants shall submit
6 Remedial Design Reports, as set forth below, which will explain
7 in detail how the Defendants will design and implement the remedy
8 (based on the Removal and Grading Specifications set forth in
9 subsection (G.) and as generally described in Appendix B to this
10 Decree). These reports shall be submitted, first as a conceptual
11 design, and then as a 30%, Pre-Final and Final Design as follows:

12 (a.) Conceptual Design. Defendants shall submit a
13 conceptual design for the RA that discusses how the remedy will
14 be designed and implemented in general terms and that also
15 includes a process for identification of potential disposal or
16 reuse sites.

17 (b.) 30% Design. Defendants shall submit a 30%
18 Remedial Design Report that includes, but is not limited to:

- 19 (i) 30% plans and specifications,
- 20 (ii) a discussion of compliance with Applicable
21 or Relevant and Appropriate Requirements
(ARARs), as identified in the ROD,
- 22 (iii) a discussion of equipment setup to minimize
23 impact on the wetlands, and employee and
24 consultant training as necessary for
25 asbestos removal procedures and health and
26 safety procedures, and

1 (iv) a discussion of any progress made toward
2 identifying potential disposal or reuse
3 sites.

4 (c.) Pre-Final/Final Design. Defendants shall submit
5 a pre-final and final RA plan in two parts as follows:

6 (i) the Pre-Final Plan shall show 90% completion
7 of the design and include, but not be limited
8 to:

- 9 (a.) all revisions of any additions to the
10 conceptual design,
11 (b.) construction drawings,
12 (c.) specifications,
13 (d.) schedules, and
14 (e.) cost estimates.

15 (ii) Final Design shall include, but not be
16 limited to:

- 17 (a.) all revisions of and additions to the
18 90% design, and
19 (b.) final construction drawing, and
20 (c.) identification of final disposal or
21 reuse options, provided, however,
22 that all such options must comply with
23 the requirements of subsection
24 (G.)(6.), below, and Defendants must
25 notify EPA of the selected option prior
26 to commencement of the removal of the

1
2 ring levee.

3 (3.) Final Remedial Action Report. Defendants shall
4 submit a Final Remedial Action Report after the completion of the
5 Remedial Action. The Final Remedial Action Report shall document
6 Defendants' complete performance of the Remedial Action in
7 compliance with the ROD, this Consent Decree, and the Final
8 Remedial Design Report. The Final Remedial Action Report shall
9 include, inter alia, the results of the confirmation sampling as
10 performed in accordance with the Confirmation Sampling Plan and a
11 discussion of any additional post-sampling removal required by
12 subsection (G.), below.

13 (4.) Confirmation Sampling Plan.

14 (a.) Defendants shall submit to EPA for its approval a
15 Confirmation Sampling Plan for sampling, based on the Removal and
16 Grading Specifications set forth in subsection (G.), below, to
17 demonstrate the completion of the Remedial Action.

18 (b.) The Confirmation Sampling Plan shall include, but
19 not be limited to, the following:

- 20 (i) identification of sampling locations,
21 (ii) sampling procedures,
22 (iii) number of samples to be collected that
23 statistically represent the area covered by
24 the ring levee, and
25 (iv) sampling analysis.

26 (5.) Quality Assurance/Quality Control Plan.

Defendants shall submit a Quality Assurance/Quality Control Plan

1 ("QA/QC Plan") for implementation of the remedial action. The
2 QA/QC Plan shall be prepared in accordance with current EPA
3 guidance, Interim Guidelines and Specifications for Preparing
4 Quality Assurance Project Plans, QAMS-005/80. The QA/QC plan
5 shall include provisions for data validation.

6 (6.) Community Outreach Plan. Defendants shall submit
7 a plan for soliciting public comments and informing the public of
8 RD/RA project status and the presence of asbestos in the ring
9 levee. The Community Outreach Plan shall be prepared as a
10 supplement to the EPA Community Relations Plan for the South Bay
11 Asbestos Area Site. The Plan shall provide for written
12 communication(s) with the public ("fact sheet(s)") and community
13 meeting(s), if appropriate; shall provide for EPA review and
14 approval of the fact sheet(s) and written information released to
15 the public at such community meetings; shall provide for a
16 minimum of two weeks notice to the community of Remedial Action
17 activities; shall provide that community outreach materials be
18 translated into Spanish and that a Spanish/English interpreter be
19 available at any community meetings; and shall designate a person
20 to act as a Community Contact for the Site who shall be present
21 at the Site during removal of the levee. Following approval of
22 the Community Outreach Plan by EPA, Defendants shall make a copy
23 of the plan available for public inspection at the Alviso Library
24 or the Family Health Foundation.

25 (7.) Worker Health and Safety Plan. Defendants shall
26 submit a Worker Health and Safety Plan that meets the

1 requirements of 29 CFR Part 1910.120 and EPA's Standard Operating
2 Safety Guides.

3 (8.) Permitting Plan. Defendants shall submit a plan
4 describing any or all approvals and permits necessary for comple-
5 tion of the RD/RA and the Defendants' proposal for satisfying any
6 such permit or approval.

7 (9.) RD/RA Progress Reports. Defendants shall provide
8 written progress reports to EPA which shall describe all actions
9 taken to comply with this Consent Decree, including a general
10 description of activities commenced or completed during the
11 reporting period (including dust suppression), Remedial Design
12 and/or Remedial Action activities projected to be commenced or
13 completed during the next reporting period, any problems that
14 have been encountered or are anticipated by Defendants in
15 commencing or completing the RD/RA activities, and the results of
16 and sampling, tests, or other data gathering effort. These
17 progress reports shall be submitted to EPA on a quarterly basis,
18 beginning three months after entry of the decree, until three
19 months before the Remedial Action is projected to begin.
20 Thereafter, RD/RA progress reports shall be submitted to EPA on a
21 monthly basis until the Final Remedial Action Report is submitted
22 in accordance with subsection (F.)(3.), above. The reports shall
23 be submitted to EPA by the 10th of each month (or every third
24 month during the period when reports are due on a quarterly
25 basis) for work done in the preceding month(s) and planned for
26 the current (and/or succeeding) month(s).

CONSENT DECREE - 21 -

1 (G.) Removal and Grading Specifications

2 (1.) AREAS A, B, C, E, F, G, H, I, AND J: Materials
3 shall be excavated and removed from Areas A, B, C, E, F, G, H, I,
4 and J, (which areas are further described in Appendix B, and are
5 depicted on the map of the Ring Levee Site attached as Exhibit A
6 to this Decree), to estimated pre-existing grades.

7 (2.) Soil samples shall then be taken along the
8 centerline of the levee, at approximately 100 foot intervals. At
9 these locations, samples shall be taken both at pre-existing
10 grade and at a depth one foot below pre-existing grade. Samples
11 shall be analyzed for asbestos content using Polarized Light
12 Microscopy (PLM) analysis.

13 (3.) No further material shall be required to be
14 removed if results of soil testing show that exposed surface soil
15 contains less than 1% asbestos.

16 (4.) If material at pre-existing grade contains
17 greater than 1% asbestos, but material at a one foot depth below
18 pre-existing grade does not, then excavation shall continue up to
19 one foot depth below pre-existing grade until exposed surface
20 soil contains less than 1% asbestos. Material excavated below
21 pre-existing grade shall be dressed to establish final pre-
22 existing grades.

23 (5.) If both the samples at pre-existing grade and at
24 a one foot depth below pre-existing grade contain greater than 1%
25 asbestos, then this condition shall be presumed to have pre-
26

CONSENT DECREE - 22 -

1 existed the construction of the ring levee, and no additional
2 material shall be required to be removed.

3 (6.) Any disposal or re-use site options identified by
4 Defendants shall be discussed in the Final Remedial Design Plan
5 required by subsection (F.)(2.)(b.)(ii), above, and shall be
6 subject to EPA approval pursuant to Section VII. Fill material
7 containing asbestos that is removed during the Remedial Action
8 need not be disposed of at a RCRA landfill, provided, however,
9 that any disposal or reuse must permanently encapsulate the
10 asbestos fill material in a manner that is protective of public
11 health and the environment and must comply with all applicable
12 federal and state laws and regulations. Prior to approval of
13 Defendants' proposed disposal or reuse site option(s), EPA will
14 confer with the State of California concerning the proposal(s)'
15 compliance with applicable state laws and regulations.

16 (7.) Defendants shall provide appropriate personnel,
17 including a field biologist, as necessary, to oversee the Work,
18 to ensure that the Work is performed in a manner that minimizes
19 disturbance to the wetlands and wildlife, and to ensure that the
20 final grading of the Remedial Action is consistent with the
21 Restoration and Mitigation Plans. Whenever possible, earth
22 moving equipment shall work from fill as it is removed, and shall
23 not enter adjacent wetland area. Defendants shall not operate
24 earth moving equipment in existing wetland areas except on areas
25 or pads designed and constructed to minimize disturbance to the
26 wetlands and wildlife. Defendants shall restore any such area or

1 pad as determined necessary by the DE at the completion of the
2 Work.
3

4 (8.) The slopes of the levee adjacent to the wetland
5 areas where only upper asbestos-laden layers of the levee will be
6 removed shall be graded as gradually as possible to prevent or
7 minimize erosion into the wetlands.

8 VI. RESTORATION AND MITIGATION WORK TO BE PERFORMED

9 (A.) Obligation to Restore and Mitigate: The City shall
10 restore and mitigate for wetland and upland areas buried under
11 the ring levee and its appurtenant structures and areas disturbed
12 by the RD/RA, in accordance with the provisions of this Section.
13 The Restoration and Mitigation Work required by this Section
14 shall be performed in accordance with the final approved
15 Restoration and Mitigation Plans, the Mitigation and Restoration
16 Area Surveys, and in accordance with the other terms of this
17 Section; provided, however, that if EPA is unable to certify the
18 completion of the Remedial Action pursuant to Section XXXIV(A.)
19 within three months of receipt of the Final Remedial Action
20 Report, the dates for completion of the Restoration and
21 Mitigation Work shall be extended by the length of time
22 corresponding to EPA's delay.

23 (1.) The Mitigation Work required by subsection (F.),
24 below, [soil preparation (including excavation and grading),
25 planting and seeding], including all tasks necessary for the
26 performance of such Work, shall be completed as soon as
practicable, but no later than December 31, 1995.

1 (2.) The Restoration Work required by subsection (F.),
2 below, (soil preparation, planting and seeding), including all
3 tasks necessary for the performance of such Work, shall be
4 completed as soon as practicable, but no later than October 31,
5 1996.

6 (B.) All wetlands Restoration and Mitigation Work pursuant
7 to this Section shall be performed by persons and/or firms with
8 qualifications and experience suitable to perform the Work
9 required by this Section. In addition, the Restoration and
10 Mitigation Work (R/M Work) shall be performed under the
11 supervision (including field supervision) of a biologist with
12 qualifications and experience suitable to oversee and review the
13 wetlands Restoration and Mitigation Work. Before bids or
14 proposals for such consultants and/or contract personnel are
15 solicited by the City, the City shall submit to the District
16 Engineer (DE) for the U.S. Army Corps of Engineers (COE) in
17 writing its bid specifications or requests for proposals (RFPs)
18 including required qualifications and experience. Any contract
19 personnel chosen by the City to perform the Work required by this
20 Section shall have such qualifications and experience as have
21 been approved by the DE. Prior to the initiation of R/M Work for
22 the Site, the City shall notify COE in writing, of the name,
23 title, and qualifications of the biologist and any other
24 consultants or contract personnel to be used in supervising
25 and/or performing the R/M Work to be performed pursuant to this
26 Consent Decree.

CONSENT DECREE - 25 -

1 (C.) Mitigation Areas: The City shall mitigate for the
2 loss of wetlands buried by the ring levee in the areas shown on
3 the map attached as Exhibit B as follows:

4 (1.) Subject to the provisions of subsection (C.)(5.),
5 below, the City will implement mitigation measures at one of the
6 following three combinations of sites:

7 --Option A: Site 1, Site 3, and Site 4; or

8 --Option B: Site 2, Site 3, and Site 4; or

9 --Option C: a combination of Sites 1 and 2, as set
10 forth in subsection (C.)(4.), below.

11 The City will retain the authority to select either Option A, B,
12 or C, as long as such selection is consistent with the
13 requirements set forth in subsections (2.)-(4.), below, and the
14 DE has been notified in writing as to which option the City has
15 chosen and the reason(s) therefor. In addition, the City shall
16 remove scrap pipe (old culverts) from an area adjacent to and
17 east of Spreckles Avenue, as shown on Exhibit B.

18 (2.) If Site 2 (Option B) is the preferred
19 alternative, the City must perform chemical analyses of soils and
20 benthic organisms as well as leachate analyses at Site 2. The
21 City must submit a sampling plan to the DE for review and
22 approval by the Corps and review and concurrence by EPA and the
23 United States Fish and Wildlife Service (FWS). (The DE shall
24 submit the sampling plan to EPA and FWS.) Concentrations of
25 heavy metals, PCBs, pesticides, and other constituents listed in
26 the full target compound list, and Biological Oxygen Demand (BOD)
must meet acceptable levels. Testing must be performed in

CONSENT DECREE - 26 -

1 accordance with the QA/QC procedures as set forth in Section VIII
2 and in the QA/QC Plan required by Section V(F.) (5.). If the DE
3 determines, after consultation with FWS and EPA, that it is
4 necessary to test adjacent marshland in order to determine
5 acceptable levels on Site 2, the City will perform such testing
6 and will compare the results of these tests to contaminant levels
7 on Site 2. The results will be reviewed by EPA, COE, and FWS,
8 and a decision to use Site 2 will not be made without a
9 determination by COE (in consultation with EPA and FWS) that the
10 site does not contain levels of heavy metals or other
11 contaminants that would make it unsuitable for enhancement and
12 consequent use as a mitigation site. If Site 2 is determined to
13 be a suitable mitigation site, a portion of the filled road
14 (Pacific Avenue) must be removed (or a culvert installed) so that
15 this site can be opened to the slough in the northwest corner of
16 Site 2 at the lowest existing elevation in the terrain of Site 2
17 adjacent to the slough. The City shall also install a weir to
18 regulate water depth at the site if necessary to control the
19 entrance of water to the site. The ultimate plan consists of
20 cultivating vegetation on 25% of the site around the site
21 perimeter with the site interior reserved for open ponded water.

22 (3.) If Site 1 (option A) is the City's preferred
23 site, or if it is determined that Site 2 is unsuitable, the
24 existing underground diesel fuel tank on Site 1 must be removed
25 and placed above ground. This tank as well as the on-site
26 generator, pump station and required access road will occupy no

1 more than 25% of the site's acreage; all unused buildings and
2 facilities must be removed. The remaining approximately one acre
3 of the site shall be excavated and opened to the slough east of
4 this site via a culvert under Spreckles Avenue with inverts at
5 existing grades in the slough adjacent to the site to allow the
6 flow of water onto the site, thus allowing it to function as a
7 Wetland, as defined in Section II(R.), above. Berms will be
8 constructed as needed around any remaining facilities to protect
9 them and along the southern boundary of the property to allow the
10 Site to be inundated by waters of the slough east of Spreckles
11 Avenue.

12 (4.) Options A and B both require Work on Sites 3 and
13 4, as shown on Exhibit B, in addition to Work on either Site 1 or
14 Site 2, respectively, as set forth in subsections (2.)-(3.),
15 above. As to Site 3, the City shall remove excess fill, scrap
16 wood, metal and other debris, and shall perform the soil
17 preparation, planting, and seeding required by subsection (F.),
18 below. As to Site 4, the City shall remove excess fill, and
19 shall regrade the site to connect onsite depressions (which
20 seasonally pond with water) with the adjacent onsite slough to
21 encourage more frequent ponding on this site. The City shall
22 then perform the soil preparation, planting, and seeding required
23 by subsection (F.), below.

24 (5.) Option C requires mitigation Work on both Sites 1
25 and 2 and requires: a) testing of Site 2 for its suitability as
26 specified in subsection (C.)(2.), above; b) removing a portion of

1 the filled road (Pacific Avenue) and opening Site 2 to the slough
2 at the northwest corner of Site 2 as specified in subsection
3 (C.)(2.), above; c) removing the existing facilities on the
4 northern three-eighths acre of Site 1; d) opening the northern
5 approximately three-eighths acre of site 1 to the slough on the
6 east side of this site via a culvert under Spreckles Avenue with
7 inverts at existing grades in the slough adjacent to the site to
8 allow the flow of water onto the site, thus allowing it to
9 function as a Wetland, as defined in Section II(R.), above; e)
10 removing approximately 75 linear feet of the levee separating
11 Sites 1 and 2; and f) constructing a berm across Site 1 to
12 separate the northern three-eighths acre of Site 1 from the on-
13 site pump station, generator, fuel tank, and access road. It is
14 expected that these actions will provide approximately three-
15 eighths of an acre of wetlands on Site 1 and enhance
16 approximately 4.5 acres of wetlands on Site 2.

17 (6.) If the City, after consultation with COE, FWS,
18 and EPA, determines that none of the three options set forth at
19 subsection (1.) above is feasible for enhancement and use as a
20 mitigation site, the City is responsible for proposing, within
21 six months of the date of this determination, other alternative
22 mitigation sites and/or measures as close to the Ring Levee Site
23 as possible, preferably within Santa Clara, San Mateo, or Alameda
24 Counties. Any such proposals must create 2-2.5 acres of wetlands
25 or enhance 5-10 acres of existing wetlands and must provide
26 habitat value gains similar to those which would be achieved

1 through the above options. The Mitigation Survey, Mitigation
2 Plan, and Mitigation Work on alternative mitigation sites must be
3 implemented in accordance with the schedules set forth in this
4 Section.

5 (7.) After selection of the Mitigation Areas and
6 before commencing mitigation Work the City shall delineate the
7 Mitigation Areas, in a Mitigation Area Survey, under the guidance
8 of the DE. For this purpose, the City shall provide a licensed
9 survey crew to record the boundaries and elevations of the
10 Mitigation Areas, marked as part of the delineation, to be
11 plotted on a certified topographic survey map, at a scale 1" =
12 200 ft. The Mitigation Area Survey shall be completed no later
13 than August 31, 1991.

14 (D.) Restoration Areas: The City shall perform the
15 Restoration Work required by this Section in the Restoration
16 Areas, the approximate boundaries of which are shown on the map
17 attached as Exhibit B. Before commencing the initial Restoration
18 Work, and no later than 90 days after completion of the Remedial
19 Action, the City shall delineate the Restoration Area in a
20 Restoration Area Survey performed under the guidance of the Corps
21 of Engineers District Engineer (DE). For this purpose, the City
22 shall provide a survey crew to record the boundaries and
23 elevations of the Restoration Areas, marked as part of the
24 delineation, to be plotted on a certified topographic survey map,
25 at a scale 1" = 200 ft. This Restoration Area Survey shall
26 include all reaches outlined in Exhibit B to this Decree (Reaches

1 - 4) and any adjacent upland areas (excluding existing paved roads or areas obstructed by buildings, equipment, debris, or other impediments) located within 30 feet of the wetland Restoration Areas along the length of the upland side of the levee. (The Restoration Area does not include, and thus the survey need not include, upland areas that were buried beneath the Levee but that are not adjacent to wetland areas.)

(E.) Restoration and Mitigation Plans: The City shall submit to the DE for approval Restoration and Mitigation Work Plans (R/M Plans) which shall describe in detail the Restoration and Mitigation Work, respectively, to be performed at the Restoration and Mitigation Areas. The R/M Plans shall also be submitted by the DE to EPA and FWS for review and concurrence. The R/M Plans shall assure that all Work shall meet appropriate professional standards and the requirements set out in this Section.

(1.) The R/M Plans shall be prepared by a biological consultant, contractor, or staff person, whose qualifications have been approved as set forth in subsection (B.) above (the Selected Biologist). The final plans shall be written to reflect topographic conditions shown on certified surveys prepared pursuant to Sections VI(C.)(6.) and (D.) and shall include typical cross-sections of existing and proposed elevations.

(2.) Prior to submittal of the Mitigation Plan to the DE, the City shall have a certified hydrologist review the Plan to verify that the proposed water regime [i.e., natural or

1 subject to static artificial means (such as a weir) to control
2 the level of water] for the Mitigation Area would be expected to
3 create a successful wetland project. The City shall include a
4 copy of the hydrologist's review and calculations in the
5 Mitigation Plan.

6 (3.) Prior to submittal of the Restoration Plan to the
7 DE, the City shall have a hydrologist from the Santa Clara Valley
8 Water District review the Plan. The City shall include a copy of
9 any comments or analysis by the hydrologist in the Restoration
10 Plan.

11 (4.) The R/M Plans shall require that the City provide
12 appropriate field personnel, including the Selected Biologist, as
13 necessary, to oversee the soil preparation of the R/M Areas
14 required by subsection (F.)(1.), below, and the seeding and
15 planting required by subsection (F.)(2.), below, and to ensure
16 that the Work is performed in a manner that minimizes detrimental
17 impact to the wetlands and wildlife and that is consistent with
18 the R/M Plans.

19 (5.) The R/M Plans shall incorporate the standards and
20 requirements set forth below at subsections (F.) and (G.).

21 (6.) The R/M Plans shall describe criteria to be used
22 to evaluate whether plant growth in all created, restored and
23 enhanced areas is successful and whether the Restoration and
24 Mitigation Work has been successfully completed. The R/M Plans
25 shall require close coordination with FWS and COE throughout the
26 Restoration and Mitigation Work.

1 (7.) Submission of Mitigation Plan. The Mitigation
2 Plan (including the schedule) shall be submitted to the DE no
3 later than March 1, 1992. The Mitigation Plan shall include a
4 schedule for the Mitigation Work which shall include, at a
5 minimum, the following milestones:

6 (a.) Completion of the Mitigation Work required by
7 subsection (F.) (soil preparation, planting and seeding),
8 including all tasks necessary for the performance of such Work,
9 as soon as practicable, but no later than December 31, 1995.

10 (b.) Submission of mitigation progress reports as
11 required by subsections (G.)(4.) and (G.)(6.), below.

12 (8.) Preliminary and Final Restoration Plan.

13 (a.) Submission of Preliminary Restoration Plan. The
14 Preliminary Restoration Plan shall be submitted to the DE prior
15 to the removal of the levee, but no later than February 1, 1994.
16 The Preliminary Restoration Plan shall be conceptual in nature
17 and shall include a tentative schedule for the Restoration Work
18 (taking into account expected progress on the RD/RA Work). The
19 tentative schedule shall include dates for submission of the
20 Final Restoration Plan and for the milestones set forth in
21 subsections (b.)(i)-(iii), below.

22 (b.) Submission of Final Restoration Plan. Within
23 three months after completion of the Remedial Action, the City
24 shall submit a Final Restoration Plan, including a definite
25 schedule for the Restoration Work which shall take into account
26

1 all current conditions and needs at the restoration site. This
2 schedule shall include at a minimum, the following milestones:

3 (i) Completion of the Restoration Work as
4 required by subsection (F.) (soil preparation, planting and
5 seeding), including all tasks necessary for the performance of
6 such Work, as soon as practicable, but no later than October 31,
7 1996.

8 (ii) Submission of restoration progress reports
9 as required by subsections (G.)(4.) and (G.)(6.), below.

10 (iii) Submission of a Final Restoration/
11 Mitigation Report upon completion of all Restoration and
12 Mitigation Work required by this Section. The report shall
13 summarize the Restoration and Mitigation Work as well as
14 monitoring and maintenance activities performed pursuant to
15 subsection (G.), below.

16 (F.) Standards for Restoration and Mitigation: The City
17 shall excavate and grade (where necessary in the Mitigation
18 Area), prepare the soil, seed, and plant the R/M Areas in
19 accordance with the following requirements:

20 (1.) Soil Preparation:

21 (a.) Mitigation Areas shall be excavated and graded in
22 appropriate fashion as specified in the Mitigation Plan. Where
23 the Mitigation Areas are adjacent to the Ring Levee Site, the
24 excavation and grading shall be done in a manner that is
25 consistent with the RD/RA. As part of the Remedial Action,
26 Restoration Areas shall be graded to approximately pre-existing

1 grade in accordance with Section V(G.) (Removal and Grading
2 Specifications).

3 (b.) The City shall not dispose of material excavated
4 for Restoration or Mitigation Work in "waters of the United
5 States" within the meaning of 33 U.S.C. § 1362(7) and regulations
6 promulgated thereunder. Prior to disposal, the City shall submit
7 its choice of site to the COE for its review and determination
8 that it is not within "waters of the United States."

9 (c.) The City shall provide appropriate personnel,
10 including the Selected Biologist, as necessary, to oversee the
11 R/M Work to ensure that the work is performed in a manner that
12 minimizes disturbance to the wetlands and wildlife. Whenever
13 possible, earth moving equipment shall work from fill as it is
14 removed, and shall not enter adjacent wetland area. The City
15 shall not operate earth moving equipment in existing wetland
16 areas except on areas or pads designed and constructed to
17 minimize disturbance to the wetland. The City shall restore any
18 such area or pad as determined necessary by the DE at the
19 completion of the Work.

20 (d.) No Restoration or Mitigation Area shall be
21 planted or re-planted until the area has been suitably prepared
22 using a disc plow or other appropriate device.

23 (2.) Seeding and Planting.

24 (a.) Upland slopes delineated on the Restoration
25 Survey (i.e., upland areas, excluding paved roads or areas
26 obstructed by buildings, equipment, debris, or other

1 impediments), that are located within 30 feet of the wetland
2 Restoration Areas along the length of the upland side of the
3 levee), upland slopes that had been buried beneath the Ring
4 Levee, and any upland slopes disturbed by the Remedial Action or
5 the Restoration or Mitigation Work shall be hydroseeded with an
6 appropriate grass mix and planted with coyote brush (Baccharis
7 sp.) to mitigate for upland habitat losses and minimize erosion
8 into the newly created wetlands.

9 (b.) All wetland Restoration and Mitigation Areas
10 shall be replanted by seeding, or planting seedlings or cuttings,
11 using suitable mixtures of indigenous wetland species calculated
12 to produce mature plant groups similar to those inhabiting
13 immediately adjacent existing wetlands, i.e., predominantly
14 pickleweed (Salicornia sp.), except the wetland area paralleling
15 Grand Avenue, which shall be predominantly salt grass (Distichlis
16 spicata) and alkali heath (Frankenia grandifolia). Wetlands
17 restored, created, or enhanced should approximate 80% areal plant
18 coverage (except Mitigation Site 2, if selected, which should
19 approximate 25% areal plant coverage) by obligate or facultative
20 wetland plant species. Wetland plant donor sites must be
21 identified in the R/M Plans and must be approved by the
22 Sacramento Fish and Wildlife Enhancement Field Office of the U.S.
23 Fish and Wildlife Service. Any wetland plants to be disturbed by
24 restoration, creation or enhancement are to be collected prior to
25 disturbance, stored in a responsible manner, and used in the
26

1 replanting phase. Plans should include the source of the plants,
2 and a methodology for gathering, storage and planting.

3 (G.) Inspection, Monitoring and Maintenance of Restoration
4 and Mitigation Work. The City shall inspect, monitor, and
5 maintain the Restoration/Mitigation Areas as follows:

6 (1.) The City shall inspect and monitor the
7 Restoration and Mitigation Areas not less than once every four
8 months for the first full calendar year after the completion of
9 initial restoration or mitigation and thereafter not less than
10 once every year during each growing season in accordance with
11 subsection (G.)(6.). Inspections shall be performed by the
12 Selected Biologist.

13 (2.) The City's inspection shall include a measure of
14 areal plant coverage in accordance with COE approved methodology.
15 The City shall also inventory for signs of erosion on slopes or
16 hydrologic problems within the Restoration and Mitigation Areas.

17 (3.) The City may, at its option, perform surveys of
18 wildlife species and numbers which colonize Mitigation Sites 1
19 and/or 2 (depending on the Site(s) selected) and 4, described
20 above. These surveys would be used for informational purposes
21 only and not for determination of success of plant growth or
22 necessity of remedial measures by the City.

23 (4.) The City shall provide the DE with a written
24 restoration and/or mitigation progress report, based on the
25 inspection, not later than 30 days after each inspection. These
26 progress reports shall also include a discussion of problems or

1 other concerns, as well as corrective measures to be taken to
2 address any such problems or concerns. The DE shall provide
3 these reports to EPA and FWS.

4 (5.) The City shall discuss any corrective measures
5 with the DE prior to implementation. Any such corrective
6 measures must be approved by the COE (with the concurrence of
7 FWS, and EPA) prior to implementation.

8 (6.) Inspection, monitoring, and maintenance shall
9 continue for two years after the DE, in consultation with the
10 Selected Biologist, FWS and EPA, has determined that the R/M Work
11 has been successfully completed in accordance with the criteria
12 set forth in the R/M Plans, as required by subsection (E.)(5.),
13 provided, however, that monitoring and maintenance shall not
14 exceed 5 years after initial planting.

15 (7.) The City shall take appropriate measures (such as
16 erecting signs, bollards, and/or roping off the Restoration and
17 Mitigation areas) to discourage vandalism, dumping, or other
18 activities that may adversely impact wetland areas restored,
19 created, or enhanced pursuant to this Section from the time of
20 commencement of the Mitigation and Restoration Work until
21 certification of the R/M Work in accordance with Section
22 XXXIV(B.), provided, however, that the City is not required to
23 erect fencing around the Mitigation or Restoration Areas.

24 (8.) The City shall take appropriate measures to
25 remove any unauthorized fill, trash, or other debris placed by
26 others in Restoration or Mitigation Areas owned by the City from

1 the commencement of the Mitigation and Restoration Work until
2 certification of the R/M Work in accordance with Section
3 XXXIV(B.). Further, to the extent authorized by law and to the
4 extent possible, the City shall negotiate with landowners to
5 remove, or shall take other appropriate measures to remove or to
6 cause the removal of, unauthorized fill, trash, or other debris
7 placed by others on Restoration or Mitigation Areas that are on
8 private property from the commencement of the Mitigation and
9 Restoration Work until certification of the R/M Work in
10 accordance with Section XXXIV(B.). If the City is unable to
11 effect the removal of such debris, it shall notify the DE in
12 writing and shall describe its efforts.

13 (H.) Mitigation Guarantee: The City and any of its agents
14 shall not disturb vegetated wetlands to the extent that, and for
15 so long as, the City owns the Restoration Area or Mitigation
16 Area; shall record notice that no such disturbance shall be
17 permitted in the appropriate local land records; and shall impose
18 restrictions designed to prohibit any interference with the
19 continuation of such property as vegetated wetlands in any
20 contract of sale, or deed conveying the property. The obligation
21 imposed on the City by this part shall survive the expiration of
22 this Consent Decree as a contract.

23 (I.) Obligation To Comply: The City is permanently
24 enjoined from discharging fill material into the Restoration and
25 Mitigation Areas, except in accordance with a permit properly
26

1 issued by the Corps pursuant to Clean Water Act Section 404, 33
2 U.S.C. § 1344.

3 VII. PROCEDURE FOR DELIVERABLES

4 (A.) Defendants shall submit the RD/RA Work Plan to EPA in
5 accordance with the deadline set forth in Section V(F.)(1.).
6 Defendants shall submit to EPA each of the other deliverables
7 listed in Section V (except the RD/RA Progress Reports, which
8 shall be submitted as provided in Section V(F.)(9.)) in
9 accordance with the schedule set forth in the approved RD/RA Work
10 Plan. Any failure of Defendants to submit a deliverable in
11 compliance with the applicable deadlines will be deemed a
12 violation of this Decree.

13 (B.) The City shall submit to the District Engineer (DE) for
14 the Corps of Engineers (COE) all deliverables required by Section
15 VI, in accordance with the deadlines set forth in that Section.
16 Any failure of the City to submit a deliverable in compliance
17 with the applicable deadlines will be deemed a violation of this
18 Decree.

19 (C.) EPA (with respect to Section V deliverables) or COE
20 (with respect to Section VI deliverables) shall review each
21 deliverable submitted pursuant to this Consent Decree, and shall
22 either: (a) approve the deliverable; or (b) disapprove the
23 deliverable, notifying Defendants or the City of deficiencies and
24 requesting that the Defendants or the City modify the
25 deliverable.
26

1 (D.) Within thirty (30) days of receipt of a notice and
2 request for a modification, Defendants or the City shall address
3 EPA's or COE's requested modification(s) in a revised deliverable
4 and resubmit the deliverable to EPA or COE. Subject to the
5 provisions of subsection (F.) of this Section and of Section
6 XXI(G.), such resubmission shall not alter any right Defendants
7 or the City may have to seek dispute resolution under Section XXI
8 with respect to the resubmitted deliverable.

9 (E.) Any failure of Defendants or the City to fully
10 incorporate into the resubmitted deliverable EPA's or COE's
11 requested modifications to the deliverable will be deemed a
12 violation of this Decree. EPA or COE will provide a notice of
13 approval or disapproval to the Defendants or the City for each
14 resubmitted deliverable.

15 (F.) Any reports, plans, specifications, schedules, appen-
16 dices, and attachments required by this Decree are, upon approval
17 by EPA and/or COE, as appropriate, incorporated into this Decree.
18 Except as otherwise set forth herein, any noncompliance with such
19 approved reports, plans, specifications, schedules, appendices,
20 or attachments shall be considered a failure to comply with this
21 Decree and shall subject Defendants to stipulated penalties as
22 provided in Section XX of this Decree.

23 (G.) All deliverables, EPA or COE comments on, and notices
24 regarding, deliverables and resubmittals of deliverables made
25 pursuant to this Decree shall be sent by overnight mail,
26 certified mail return receipt requested, or some equivalent

1 delivery service that ensures timely receipt of such deliverables
2 or comments.

3
4 VIII. QUALITY ASSURANCE

5 (A.) Defendants shall use the QA/QC procedures set out in
6 the plan as set forth in Section V(F.)(5), and shall use standard
7 EPA sample chain of custody procedures, as documented in the
8 applicable version (at the time of sampling) of the National
9 Enforcement Investigations Center Policies and Procedures Manual
10 and the National Enforcement Investigation Center Manual for the
11 Evidence Audit for all sample collection and analysis activities.

12 (B.) In order to provide quality assurance and maintain
13 quality control regarding all samples collected pursuant to this
14 Decree, Defendants shall:

15 (1.) Ensure that all contracts with laboratories used
16 by the Defendants for analysis of samples taken pursuant to this
17 Consent Decree provide for access of EPA personnel and EPA
18 authorized representatives to assure the accuracy of laboratory
19 results related to the site.

20 (2.) Ensure that laboratories used by the Defendants
21 for analysis of samples taken pursuant to this Consent Decree
22 perform all analyses in accordance with applicable approved EPA
23 methods at the time of the sampling.

24 (3.) Ensure that all laboratories used by the
25 Defendants for analysis of samples taken pursuant to this Decree
26 participate in an EPA or EPA equivalent QA/QC program. As part
of the QA/QC program and upon request by EPA, such laboratories

1 shall perform at Defendants' expense analyses of samples provided
2 by EPA to demonstrate the quality of each laboratory's data.

3 IX. PROJECT COORDINATORS

4 (A.) On or before the effective date of this Decree,
5 Plaintiff and Defendants shall each designate Project
6 Coordinators to monitor the progress of the RD/RA and R/M Work to
7 coordinate communication between Plaintiff and Defendants.
8 Defendants will inform Plaintiff which Project Coordinator is to
9 serve as the primary contact for the various components of the
10 Remedial Design, Remedial Action, and Restoration and Mitigation
11 Work.

12 (B.) Plaintiff's Project Coordinator will be an EPA
13 employee and shall have the authority vested in the Remedial
14 Project Manager and On-Scene Coordinator by 40 C.F.R. § 300 et
15 seq., including such authority as may be added by amendments to
16 40 C.F.R. § 300. Plaintiff's Project Coordinator shall have the
17 authority, inter alia, to require Defendants, by notifying the
18 appropriate Project Coordinator (i.e., the designated primary
19 contact for the particular activity), to cease performance of the
20 Remedial Action or any other activity at the Site that, in the
21 opinion of Plaintiff's Project Coordinator, may present or
22 contribute to an endangerment to public health, welfare, or the
23 environment or cause or threaten to cause the release of
24 hazardous substances from the Site. Provided that Defendants
25 have been performing work in compliance with all provisions of
26 the RD/RA or R/M Plan, as appropriate, and of this Consent

1 Decree, such notice may constitute a force majeure event in
2 accordance with Section XXII(B.).

3 (C.) The absence of Plaintiff's Project Coordinator from
4 the Site shall not be cause for stoppage of the Work.

5 (D.) The parties may change their respective Project
6 Coordinators by notifying the other party in writing at least
7 seven calendar days prior to the change. In the case of illness,
8 death, or other emergency, a party may change its Project
9 Coordinator without seven days advance notice, so long as the
10 party notifies the other party by telephone as soon as
11 practicable before the change or no later than 24 hours after the
12 change. Written notice shall be sent no later than 7 days after
13 the change.

14 (E.) Defendants' Project Coordinators may assign other rep-
15 resentatives, including other contractors, to serve as a Site
16 representative for oversight of performance of daily operations
17 during remedial activities.

18 (F.) Plaintiff's Project Coordinator may assign other rep-
19 resentatives, including other EPA employees or contractors, to
20 serve as a Site representative for oversight of performance of
21 daily operations during remedial activities.

22 X. SITE ACCESS

23 (A.) To the extent that access rights or easements over
24 property other than property owned by the Defendants, are
25 required for the performance of this Decree, Defendants, or the
26 City as to property that is necessary solely for performance of

1 the R/M Work set forth in Section VI, shall obtain such access
2 rights or easements from the owners or those persons who have
3 control of the property, prior to entering that property. Such
4 site access rights or easements shall provide reasonable access
5 to Defendants, contractor(s), the United States and any of its
6 agencies, the State of California, and their respective
7 representatives.

8 (B.) In the event that sufficient site access agreements
9 are not obtained at least 45 days prior to the date upon which
10 entry is necessary for performance of the Remedial Action or the
11 R/M Work, Defendants shall notify EPA and COE (as to access
12 necessary for performance of the R/M Work), and shall describe
13 their efforts to obtain such agreements.

14 (C.) If necessary, consistent with its legal authority,
15 the United States may assist Defendants in obtaining access
16 necessary for performance of the Remedial Action or the R/M Work.
17 In the event the United States exercises its access authorities
18 under Section 104(e) or 104(j) of CERCLA, 42 U.S.C. § 9604(e),
19 (j), or under other applicable law, in order to obtain access for
20 the performance of this Consent Decree, Defendants shall
21 reimburse the United States for all costs incurred in the
22 exercise of such powers.

23 (D.) It is expressly understood that an order for immediate
24 possession issued by a court of competent jurisdiction pursuant
25 to California Code of Civil Procedure §§ 1230-1273 (Eminent
26

CONSENT DECREE - 45 -

1 Domain Law) shall be an appropriate, but not exclusive, method of
2 obtaining access rights.

3 (E.) After the effective date of this Consent Decree,
4 Defendants shall assure that the United States, and any of its
5 agencies, the State of California, and their respective
6 representatives shall have access at all reasonable times to any
7 property that is necessary for the performance, including
8 oversight, of the Work required by this Consent Decree and that
9 is owned or controlled by Defendants.

10 (F.) Defendants shall insure that their agents, employees,
11 contractors, or other authorized persons obtaining access to the
12 Ring Levee Site during the RD/RA Work comply with all applicable
13 provisions of the Worker Health and Safety Plan as submitted in
14 the Work plans required by this Decree.

15 XI. SAMPLING AND INVESTIGATION

16 (A.) Defendants shall submit copies of the original
17 laboratory summary data sheets documenting the results of all
18 sampling and/or tests or other data generated by the Defendants
19 or on the Defendants' behalf, with respect to the implementation
20 of this Consent Decree, to EPA in the progress reports described
21 in Section V(F.)(9.) of this Decree.

22 (B.) At the request of Plaintiff's Project Coordinator,
23 Defendants shall provide to Plaintiff split or duplicate samples
24 of any samples taken during the course of the RD/RA. Plaintiff
25 shall, pursuant to CERCLA § 104, 42 U.S.C. § 9604, have the right
26

1 to take any samples it deems necessary to complete or monitor
2 progress of the RD/RA.

3 (C.) During the design and construction of the RA,
4 Defendants shall notify Plaintiff's Project Coordinator of any
5 planned sampling conducted by Defendants or anyone acting on
6 their behalf at least 48 hours prior to the sampling. Plaintiff
7 shall be notified thirty (30) days prior to the disposal of any
8 sample taken during the RD/RA, and shall have an opportunity to
9 take possession of all or a portion of such sample.

10 (D.) Defendants shall permit Plaintiff to inspect and copy,
11 at Plaintiff's expense, all records, documents, photographs and
12 other materials, including all sampling and monitoring data that
13 in any way concerns the asbestos contamination at the South Bay
14 Asbestos Site. This provision pertains only to records,
15 documents, photographs and other materials that Defendants are
16 not otherwise required to include in deliverables or otherwise
17 provide to Plaintiff pursuant to the terms of this Decree.

18 (E.) At the request of Defendants, Plaintiff will provide
19 split or duplicate samples collected by Plaintiff and the
20 analytical results obtained from the samples. If Plaintiff col-
21 lects any samples, or undertakes any other testing Work pursuant
22 to the RD/RA Workplan, it will notify Defendants' Project Coor-
23 dinator at least forty-eight (48) hours in advance and permit
24 Defendants to observe the Work.

25 (F.) Defendants may assert a confidentiality claim, cover-
26 ing part or all of the information gathered and submitted pur-

1 suant to this Decree pursuant to 40 C.F.R. § 2(B): If Defendants
2 do not make a confidentiality claim pursuant to this subsection
3 at the time the information is submitted to Plaintiff, the infor-
4 mation may be made available to the public without any notice to
5 Defendants.

6
7 XII. ASSURANCE OF ABILITY TO COMPLETE WORK

8 (A.) Defendants shall demonstrate their ability to complete
9 the Work required by this Decree and to pay all claims that arise
10 from the performance of the Work by obtaining, and presenting to
11 EPA for approval within thirty (30) calendar days after the
12 effective date of this Decree, one of the following items: 1)
13 performance bond, 2) letter of credit, or 3) guarantee by a third
14 party. Plaintiff may disapprove the financial assurance
15 mechanism presented if the Plaintiff determines that it does not
16 provide adequate assurance that Defendants are able to complete
17 the Work.

18 (B.) In lieu of any of the three items listed above,
19 Defendants may present, for Plaintiff's review and approval, in-
20 ternal or public financial information sufficient to satisfy
21 Plaintiff that the Defendants have sufficient assets to make fur-
22 ther assurances unnecessary. If Defendants rely on internal or
23 public financial information for financial assurance, Defendants
24 shall submit updates of such information to EPA on a semi-annual
25 basis. Subject to the provisions of Section XXI (Dispute
26 Resolution), if Plaintiff determines the financial assurances of
Defendant Raisch to be inadequate, Defendant Raisch shall obtain

1 one of the three other financial instruments listed above within
2 thirty (30) calendar days of such determination.

3 XIII. COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS

4 (A.) All actions required to be taken pursuant to this
5 Consent Decree shall be undertaken in accordance with the re-
6 quirements of all applicable local, state and federal laws, and
7 regulations, in accordance with CERCLA as amended, CWA, the NCP,
8 and the ROD. This Decree shall in no way relieve Defendants of
9 their obligation to comply with such laws and regulations.

10 (B.) Defendants shall include in all contracts or sub-
11 contracts entered into for Work required under this Consent
12 Decree, provisions stating that such contractors or subcontrac-
13 tors, including their agents and employees, shall perform all ac-
14 tivities required by such contracts or subcontracts in compliance
15 with all applicable laws and regulations.

16 (C.) This Consent Decree is not, nor shall it act as, nor
17 is it intended by the Parties to be, a permit issued pursuant to
18 any federal, state, or local statute or regulation. Defendants
19 shall obtain all permits and approvals required under applicable
20 law. However, in accordance with Section 121(e)(1) of CERCLA, no
21 federal, state, or local permit shall be required for any RD/RA
22 Work that is conducted entirely onsite and in accordance with the
23 terms of this Consent Decree. In addition, no Section 404 permit
24 shall be necessary for any Restoration or Mitigation Work that is
25 conducted in the R/M Areas in accordance with the terms of this
26 Decree.

1 (D.) All permits or other approvals, including permits for
2 offsite disposal of hazardous substances, shall be identified in
3 the Permitting Plan submitted under Section V(F.)(8.) of this
4 Decree. For any permit requirement subject to the CERCLA Section
5 121(e)(1) exemption, the Permitting Plan shall describe how
6 Defendants will fulfill the substantive "applicable requirements"
7 of such a permit.

8 XIV. RETENTION OF RECORDS

9 (A.) Until the completion of the Work and termination of
10 this Consent Decree, in accordance with Section XXXIV, Defendants
11 shall preserve, and shall instruct their contractor, their
12 contractor's subcontractors, and anyone else acting on
13 Defendants' behalf at the site to preserve (in the form of
14 originals or exact copies, or in the alternative, microfiche of
15 all originals) all records, documents and information of whatever
16 kind, nature, or description relating in any manner to asbestos
17 at the Ring Levee Site or to the implementation of this Consent
18 Decree.

19 (B.) After the termination of the Decree, Defendants shall
20 notify Plaintiff's project coordinator no later than 60 days
21 prior to the destruction of such documents. Upon request by
22 Plaintiff, copies of all such records, documents, and
23 information, except any documents as to which Defendants assert a
24 claim of attorney-client or work product privilege, shall be
25 delivered to Plaintiff's Project Coordinator. As to any
26 documents for which Defendants assert a claim of privilege,

1 Defendants shall provide Plaintiff with a list and description of
2 any such documents. In the event Plaintiff disputes a claim of
3 attorney work product or attorney-client privilege for any
4 document(s), Plaintiff may request submission of documentation
5 supporting such claim of privilege by the Defendant making such
6 claim. If after reviewing such documentation, Plaintiff
7 continues to dispute the claim of privilege, Plaintiff may
8 petition the Court to review the applicability of the attorney
9 work product and/or attorney-client privilege.

10 XV. REIMBURSEMENT OF PAST AND OVERSIGHT COSTS

11 (A.) Defendants shall reimburse the United States the sum
12 of \$736,023.00 in settlement of all response costs incurred with
13 respect to the South Bay Asbestos Ring Levee Site by the United
14 States through January 31, 1990. Defendants shall reimburse
15 Plaintiff for these past costs in five equal annual installments
16 of principal plus interest on the remaining principal balance
17 from date of entry ^{10/28/91} to the date of payment. Interest shall be at
18 the rate specified in CERCLA Section 107(a) and any applicable
19 guidance. Payment of each annual installment shall be due on
20 September 1 of each year from 1990-1994.

21 (B.) In addition, Defendants shall reimburse the United
22 States for all response costs incurred at the Ring Levee Site in-
23 curred on or after February 1, 1990 including costs for oversight
24 of the Work to be performed by Defendants. On or before January
25 31st of each calendar year, Plaintiff shall submit to Defendants
26 an accounting of all response and oversight costs incurred by

1 Plaintiff with respect to this Consent Decree in the previous
2 fiscal year, ending September 30th of the preceding year. The
3 accounting will consist of EPA's SPUR report or other cost
4 summary, a summary of Department of Justice costs and any
5 additional costs, and the rate of interest specified in CERCLA
6 Section 107(a) and any applicable guidance on these costs that
7 will apply from the date of demand until the date of payment. If
8 EPA is unable to supply all such cost documentation by January
9 31st in any particular year, it shall submit an estimate of costs
10 incurred to Defendants by January 31st. This estimate is to be
11 used by the City for budgeting purposes. EPA shall submit
12 complete cost documentation as soon as possible thereafter. If
13 the total amount of documented costs is greater than the
14 estimated amount, and the City is unable to authorize payment of
15 the total amount by September 1 of that year, Defendants shall
16 include any amount in excess of EPA's estimate with their next
17 payment in the following year.

18 (C.) Defendants may review this documentation for
19 mathematical accuracy and to ensure that all costs were incurred
20 in connection with the South Bay Asbestos Ring Levee Site. If
21 there are no such errors, Defendants shall reimburse Plaintiff
22 for all such costs by September 1 of the calendar year in which
23 such accounting is submitted. If Defendants determine that there
24 may be such errors, Defendants shall pay any amount that is not
25 disputed by September 1 of the calendar year in which such
26 accounting is submitted. As to any amount that Defendants assert

1 has not been incurred in connection with the Ring Levee Site or
2 which is subject to mathematical error, Defendants may challenge
3 the amount of these costs on these grounds alone. Defendants
4 shall notify EPA in writing as to any such errors within thirty
5 (30) calendar days of receipt of the accounting for such costs.
6 Such challenge shall be made in accordance with the provisions of
7 Section XXI (Dispute Resolution), and such written notice shall
8 constitute the written notice required to initiate dispute
9 resolution pursuant to Section XXI(A.). Within 60 days of the
10 resolution of the dispute, Defendants shall pay any amounts that
11 have been determined to have been properly incurred.

12 (D.) Except as to costs incurred prior to February 1, 1990,
13 failure to include all relevant response costs in any accounting
14 or failure to provide all cost documentation required by
15 subparagraph (B.), above, will not preclude Plaintiff from
16 submitting such costs in any subsequent year nor will such
17 failure provide Defendants with a reason to refuse payment.

18 (E.) Payments shall be made by certified check for the
19 amount of the documented costs made payable to the "EPA-Hazardous
20 Substances Superfund." A copy of each check and transmittal
21 letter shall be sent simultaneously to the Plaintiff's Project
22 Coordinator and to the Department of Justice.

23 (F.) Checks should specifically reference the identity of
24 the site and be addressed to:
25
26

1 U.S. Environmental Protection Agency--Region 9
2 Superfund Accounting
3 P.O. Box 390863M
4 Pittsburgh, Pennsylvania 15251
5 Attention: Collection Officer for Superfund (G.)

6 Payment made pursuant to this Section shall not constitute an
7 admission by Defendants of any liability to Plaintiff or any
8 other person.

9 XVI. RESERVATIONS AND WAIVERS OF RIGHTS

10 (A.) Except as specifically provided in Section XVII,
11 (Covenant Not To Sue), Plaintiff reserves the right to take any
12 enforcement action pursuant to CERCLA and/or any other legal
13 authority, including the right to seek injunctive relief,
14 monetary penalties, and punitive damages, for any civil or
15 criminal violation of law or this Consent Decree.

16 (B.) Nothing in this Consent Decree shall be deemed to
17 limit the response authority of the United States under § 104 or
18 § 106 of CERCLA, 42 U.S.C. §§ 9604, 9606, except as set forth in
19 Section XVII.

20 (C.) Subject to the Dispute Resolution provisions of
21 Section XXI, Plaintiff expressly reserves all rights and defenses
22 that it may have, including both the rights to disapprove of work
23 performed by Defendants which does not comply with this Consent
24 Decree, and to request Defendants to perform response work at the
25 Site in addition to that detailed in Sections V and VI (including
26 the plans required therein), provided that: 1) any such
additional work is required to implement the remedy selected in
the ROD or is necessary for the implementation of the R/M Plans;

CONSENT DECREE - 54 -

1 or 2) based on new information, the conditions at the Site
2 present an endangerment to public health, welfare, or the
3 environment.

4 (D.) In the event the United States determines 1) that
5 Defendants have failed to implement in an adequate or timely
6 manner any provision of the work required pursuant to an approved
7 deliverable or this decree, or 2) Defendants refuse or otherwise
8 fail to timely perform additional work requested by the United
9 States pursuant to subsection (C.), above, the United States may
10 perform any and all portions of the work as it determines
11 necessary.

12 (E.) Defendants reserve any defenses or rights they may
13 have with respect to any actions concerning the site except any
14 rights expressly waived in this Section. Defendants retain any
15 rights, claims, remedies or defenses that they may have between
16 themselves or as against other potential responsible parties.

17 (F.) Defendants waive any right they might have to chal-
18 lenge Plaintiff's or the Court's authority to issue, enter into,
19 or enforce this Decree.

20 (G.) In accordance with the provisions of Section XXI(H.)
21 (Dispute Resolution), Defendants waive any right they might have
22 to initiate a challenge to the application or amount of
23 stipulated penalties set out in Section XX of this Decree,
24 provided, however, that they do not waive the right to dispute
25 the underlying compliance issues that may have given rise to the
26 application or amount of stipulated penalties.

CONSENT DECREE - 55 -

1 (H.) By entering into and performing this Consent Decree,
2 Defendants do not admit liability for (1) the site, or (2) any
3 response costs which may have been incurred by the United States
4 or any person.

5 XVII. COVENANT NOT TO SUE

6 (A.) In consideration of actions which will be performed
7 and payments which will be made by the Defendants under this
8 Decree, and except as otherwise specifically provided in this
9 Decree, the United States covenants not to sue Defendants for any
10 and all claims (1) pertaining to the Ring Levee Site available to
11 Plaintiff under Sections 106 and 107 of CERCLA; and (2)
12 pertaining to the construction of the Ring Levee or to activities
13 performed in compliance with the requirements of Sections V and
14 VI of this Decree, available to Plaintiff under Section 404 of
15 the CWA and the Rivers and Harbors Act (RHA). With respect to
16 future CERCLA liability, this covenant not to sue shall take
17 effect upon certification by EPA of the completion of the
18 Remedial Action pursuant to Section XXXIV(A.).

19 (B.) This covenant not to sue does not include:

20 (1.) Liability arising from hazardous substances that
21 have been removed from the Ring Levee Site;

22 (2.) Any potential claims based on criminal liability;

23 (3.) Claims based on a failure by the Defendants to
24 meet the requirements of this Consent Decree;

25 ///

1 (4.) Liability for violations of law which occur
2 during implementation of the Work;

3 (5.) Liability arising from the past, present, or
4 future release or threat of release of hazardous substances other
5 than at the Ring Levee Site, except as otherwise set forth in
6 Section XVIII (De Minimis Settlement);

7 (6.) Claims arising from contamination of groundwater
8 at and in the vicinity of the Ring Levee Site;

9 (7.) Any other claims of Plaintiff for any other costs
10 or actions necessary at the Ring Levee Site which are not covered
11 under the terms of this Consent Decree;

12 (8.) Claims based on the Defendants' liability arising
13 from the past, present, or future disposal of hazardous
14 substances outside of the Ring Levee Site, except as otherwise
15 set forth in Section XVIII (De Minimis Settlement);

16 (9.) Any claim or demand for damage to federal
17 property located anywhere, other than the Ring Levee Site, that
18 the actions contemplated in this Decree are being performed.

19 (10.) Claims based on liability for any response costs
20 or any response actions necessary as a result of EPA's five year
21 review as required by Section 121(c) of CERCLA, and Section XXXII
22 of this Decree.

23 (11.) Claims based on liability under the CWA or the
24 RHS, other than claims described in paragraph (A.) above.

25 (C.) Notwithstanding any other provision of this Consent
26 Decree, the Plaintiff reserves the right to institute proceedings
27 in this action or in a new action (1) seeking to compel

1 Defendants to perform additional response Work at the site or (2)
2 seeking reimbursement of the Plaintiff's response costs, if:

3 (1.) for proceedings prior to Plaintiff's certifica-
4 tion of completion of the Work,

5 (a.) conditions at the site, previously unknown to the
6 Plaintiff, are discovered after the entry of this
7 Consent Decree, and these previously unknown conditions
8 indicate that the Work is not protective of human
9 health and the environment; or

10 (b.) information is received, in whole or in part,
11 after the entry of this Consent Decree, and this
12 information indicates that the Work is not protective
13 of human health and the environment;

14 (2.) for proceedings subsequent to Plaintiff's
15 certification of completion of the Work,

16 (a.) conditions at the site, previously unknown to the
17 Plaintiff, are discovered after the certification of
18 completion by Plaintiff, and these previously unknown
19 conditions indicate that the remedial action is not
20 protective of human health and the environment; or

21 (b.) information is received, in whole or in part,
22 after certification of completion by the Plaintiff,
23 and this information indicates that the remedial action
24 is not protective of human health and the environment.

25 (D.) Notwithstanding any other provision in this Consent
26 Decree, the covenant not to sue set forth in this Section shall

1 not relieve Defendants of their obligation to meet and maintain
2 compliance with the requirements set forth in this Decree, in-
3 cluding the conditions set forth in the ROD, as amended.

4 (E.) Defendants hereby release and covenant not to sue the
5 United States for any claim, counterclaim or crossclaim asserted,
6 or that could have been asserted prior to the effective date of
7 this Consent Decree arising out of or relating to the Ring Levee
8 Site, or to seek any other costs, damages, or attorneys' fees
9 against the United States arising out of response activities at
10 the Site.

11 (F.) Nothing in this Consent Decree shall constitute or be
12 construed to constitute a release or a covenant not to sue
13 regarding any claim or cause of action against any person or
14 entity not a signatory to this Consent Decree for any liability
15 it may have, arising out of or relating to any person or entity
16 other than the Defendants, in connection with the Ring Levee
17 Site.

18 XVIII. De Minimis Settlement Concerning
19 Areas D-1, D-2 and Truckyards

20 (A.) Within 60 days of the entry of this Decree, the City
21 and Raisch shall pay the sum of \$75,000.00. Payment shall be
22 made in accordance with Section XV, unless EPA otherwise notifies
23 Defendants 30 days prior to the date on which payment is due.

24 (B.) Except as provided in subsection (D.), below, this sum
25 is in settlement of any potential de minimis contribution of
26 hazardous substances by Raisch or the City to areas identified as

1 D-1 or D-2 on the map attached as Exhibit A, or to the areas
2 identified as "truckyards" on the map attached as Exhibit C.

3 (C.) Covenant Not To Sue.

4 (1.) Subject to the reservations of rights set forth in
5 subsection (D.), below, upon payment of the \$75,000.00 specified
6 in subsection (A.), above, the United States covenants not to sue
7 or to take any other civil or administrative action against the
8 City or Raisch for "Covered Matters." "Covered Matters" shall
9 include any and all civil liability for reimbursement of response
10 costs or for injunctive relief pursuant to Sections 106 or 107 of
11 CERCLA or section 7003 of RCRA with regard to any hazardous
12 substance contributed by Raisch or the City to the D-1 and D-2
13 Areas and the truckyards. This covenant not to sue shall be in
14 addition to the covenants set forth in Section XVII, above.

15 (2.) In consideration of the United States' covenant
16 not to sue in subsection (C.)(1.) above, the City and Raisch
17 agree not to assert any claims or causes of action against the
18 United States or the Hazardous Substance Superfund arising out of
19 Covered Matters, or to seek any other costs, damages, or
20 attorney's fees against the United States arising out of response
21 activities at Areas D-1, D-2, or the truckyards.

22 (D.) Reservation of Rights.

23 (1.) The reservations of rights set forth in this
24 Section are in addition to those set forth in Section XVI.

25 (2.) Nothing in this Section (De Minimis Settlement) is
26 intended to be, nor shall it be construed as, a release or

CONSENT DECREE - 60 -

1 covenant not to sue for any claim or cause of action a) that the
2 United States may have against the City with respect to D-1, D-2,
3 or the truckyards based solely on the City's ownership of
4 property within those areas or b) that the United States may have
5 against the City with respect to the South Bay Asbestos Area
6 other than claims that are expressly resolved pursuant to this
7 Consent Decree.

8 (3.) Nothing in this Section (De Minimis Settlement)
9 is intended to be, nor shall it be construed as, a release or
10 waiver of any claim, right, or defense that the City may have
11 with respect to claims a) that the United States may have against
12 the City with respect to D-1, D-2, or the truckyards based solely
13 on the City's ownership of property within those areas or b) that
14 the United States may have against the City with respect to the
15 South Bay Asbestos Area other than claims that are expressly
16 resolved pursuant to this Consent Decree.

17 (4.) Nothing in this Section constitutes a covenant not
18 to sue or to take action, or otherwise limits the ability of the
19 United States to seek or obtain further relief from the City or
20 Raisch if:

21 (a.) Information not currently known to the United
22 States is discovered which indicates that the City or Raisch
23 contributed hazardous substances to the South Bay Asbestos Site
24 in such greater amounts or having such greater toxic or other
25 hazardous effects that Raisch or the City no longer qualifies as
26

1 a de minimis party with respect to the D-1, D-2, or truckyards
2 areas.

3 (b.) The United States determines based upon conditions
4 in the South Bay Asbestos area previously unknown to the United
5 States, or information received in whole or in part after entry
6 of this Consent Decree, that the remedial action consistent with
7 the Record of Decision for the South Bay Asbestos Area or for the
8 Ring Levee Site is not protective of public health or the
9 environment.

10 (E.) Raisch and the City certify that, to the best of their
11 knowledge and belief, they have provided to the United States all
12 information currently in their possession, or in the possession
13 of their officers, directors, employees, contractors, or agents
14 which relates in any way to the ownership, operation, generation,
15 treatment, transportation, or disposal of hazardous substances at
16 or in connection with the D-1, D-2, or truckyard areas.

17 XIX. CONTRIBUTION PROTECTION

18 Based on Plaintiff's review of the RIFS conducted for
19 the South Bay Asbestos Area, the review of the OUFS conducted for
20 the Ring Levee Site, Plaintiff's investigation of both sites, and
21 the Administrative record to date, and subject to the provisions
22 of Sections XVII(C.) and XVIII(D.), Plaintiff has determined:
23 1) that Raisch's contribution of hazardous substances to the
24 South Bay Asbestos Area Site is limited to asbestos-contaminated
25 fill material it supplied for construction of the Ring Levee
26 (including any such material that may have come to be located in

1 Areas D-1 and D-2 of the site, and the truckyards adjacent to the
2 Ring Levee Site); and 2) that the City's contribution of
3 hazardous substances to Areas D-1, D-2, and the truckyard areas
4 adjacent to the Ring Levee is limited to asbestos-contaminated
5 fill material it supplied for construction of the Ring Levee,
6 which may have come to be located in D-1, D-2, or truckyard
7 areas. Subject to the terms of this Decree [including Sections
8 XVII(C.) and XVIII(D.)], the City and Raisch have resolved their
9 liability to the United States for the release or threatened
10 release into the environment of hazardous substances from the
11 construction, placement, and maintenance of the Ring Levee, and
12 accordingly, pursuant to Sections 113(f) and 122(g)(5), they
13 shall not be liable for claims for contribution regarding matters
14 addressed in this Consent Decree.

15 XX. STIPULATED PENALTIES

16 (A.) Except for any extensions allowed by Plaintiff in
17 writing or violations that have been excused by Section XXII
18 (Force Majeure), for each day in which Defendants fail to submit
19 a deliverable, or in which Defendants otherwise fail to meet the
20 requirements of this decree, Defendants agree to pay stipulated
21 penalties as set forth below.

22 (B.) These penalties shall accrue commencing upon, as
23 applicable: (1) Defendants' receipt of a written determination
24 of disapproval, as specified in Section VII(E.); (2) the day
25 after Defendants fail to meet the schedule(s) specified in this
26 Decree or in the Work Plan(s); or (3) the date upon which a
27

1 violation of this decree (including but not limited to
2 unauthorized work at the Site) first occurs that Defendants knew
3 or, in the exercise of reasonable diligence, should have known to
4 be in violation of this decree, and defendants fail to promptly
5 notify the United States of such violation; 4) Defendant's
6 receipt of written notice from the United States that any other
7 violation of this Decree has occurred. Penalties shall continue
8 to accrue up to and including the day on which the noncompliance
9 is corrected. Nothing herein shall prevent the simultaneous
10 accrual of separate penalties for each violation of this Decree.

11 (C.) Plaintiff, in its sole discretion, may waive
12 stipulated penalties for a violation of this Consent Decree. If
13 Plaintiff does not waive stipulated penalties, following the
14 Plaintiff's determination that stipulated penalties have been
15 triggered Plaintiff shall so notify Defendants in writing. The
16 written notice shall describe the violation, and indicate the
17 amount of penalties due.

18 (D.) Except for violations of Section VI (Wetlands
19 Restoration and Mitigation Work to be Performed), stipulated
20 penalties shall accrue at the following rates:

- 21 (1.) \$1,000 per day of the first week of violation,
22 (2.) \$5,000 per day of the second week of violation,
23 (3.) \$7,500 per day of the third week of violation,
24 (4.) \$10,000 per day of the fourth week of violation,
25 (5.) \$20,000 per day of the fifth week of violation,
26

1 (6.) \$25,000 per day of each day of violation
2 thereafter.

3 (E.) Stipulated penalties for violations of Section VI
4 (Wetlands Restoration and Mitigation Work To Be Performed) shall
5 accrue at the following rates:

6 (1.) For untimely submission of any of the
7 deliverables required by Section VI or failure of any deliverable
8 to comply with the requirements of Section VI or VII(E.):

9 \$100 per day of the first week of violation,
10 \$500 per day of the second week of violation,
11 \$750 per day of the third week of violation,
12 \$1000 per day of each day of violation thereafter.

13 (2.) For untimely performance of the Restoration or
14 Mitigation Work as required by Section VI or failure to perform
15 the Work in accordance with the approved Restoration and
16 Mitigation Plans:

17 \$500 per day of the first week of violation,
18 \$1000 per day of the second week of violation,
19 \$2500 per day of the third week of violation,
20 \$5000 per day of each day of violation thereafter.

21 (3.) For any unauthorized fill placed by the City into
22 any Restoration or Mitigation Areas, \$1000 for each day that the
23 fill remains in such areas.

24 (F.) Stipulated penalties shall be levied by EPA,
25 concerning all violations except violations of Section VI, and
26 shall be paid by certified check made payable to the "EPA-

1 Hazardous Substance Superfund" and shall be sent to the Superfund
2 address given in Section XV(E.). Stipulated penalties shall be
3 levied by COE concerning violations of Section VI, and shall be
4 paid by certified check made payable to the "F&A Officer, U.S.
5 A.E.D., Sacramento" and shall be sent to:

6 U.S.A.E.D. Sacramento
7 U.S. Army Corps of Engineers, Regulatory Branch
8 211 Main Street
San Francisco, CA 94105.

9 Along with the check, Defendants, or the City as to violations of
10 Section VI, shall submit a letter identifying the purpose of the
11 check. Checks shall be paid by the fifteenth (15th) day of the
12 month following the month in which Defendants receive written
13 notification from EPA or the COE, in accordance with subsection
14 (C.) of this Section, that stipulated penalties have been
15 triggered. Failure to timely pay a stipulated penalty is an
16 additional violation of the Decree, subject to stipulated
17 penalties. A copy of the check and the letter shall be sent to
18 the Plaintiff's Project Coordinator and the Department of
19 Justice.

20 (G.) The stipulated penalties set forth above shall be in
21 addition to any other remedies or sanctions available to Plain-
22 tiff for violation of this Consent Decree.

23 XXI. DISPUTE RESOLUTION

24 (A.) Except as set forth in subsection (H.) below, if
25 Defendants object to any decision by Plaintiff pursuant to this
26 Decree, Defendants shall notify Plaintiff's Project Coordinator
and the Department of Justice, in writing, within fourteen (14)

CONSENT DECREE - 66 -

1 days of receipt of Plaintiff's decision. Plaintiff and
2 Defendants shall then have fourteen (14) days to discuss the
3 dispute informally. A meeting may be held at Defendants' or
4 Plaintiff's request to facilitate resolution of the dispute. At
5 the end of the fourteen (14) day discussion period, Plaintiff
6 will issue a written determination of its decision regarding the
7 dispute, which determination shall become effective upon receipt
8 by the Defendants.

9 (B.) If Defendants refuse to follow the Plaintiff's deci-
10 sion regarding the dispute, Defendants may file with the Court a
11 petition briefly describing the dispute and their suggested
12 resolution within thirty (30) days of notification of Plaintiff's
13 decision.

14 (C.) Plaintiff shall have 45 days to respond to the peti-
15 tion.

16 (D.) In any dispute resolution proceeding the Court shall
17 uphold Plaintiff's decision unless Defendants can demonstrate on
18 the basis of the Administrative Record that Plaintiff's decision
19 was arbitrary and capricious or not otherwise in accordance with
20 the law.

21 (E.) If the Court finds on review of the Administrative
22 Record that Plaintiff's decision was arbitrary and capricious or
23 not otherwise in accordance with the law, then the stipulated
24 penalties for the alleged violation shall not be payable. A
25 finding that Plaintiff's decision was arbitrary and capricious or
26 not otherwise in accord with the law shall not excuse stipulated

CONSENT DECREE - 67 -

1 penalties for failure to perform actions not in dispute except to
2 the extent Defendants can show that it was impossible to perform
3 those actions pending resolution of the dispute.

4 (F.) If the Court finds that Plaintiff's decision was not
5 arbitrary and capricious, Defendants shall transmit payment of
6 all penalties which have accrued during the dispute, plus inter-
7 est at the rate specified in Section 107(a) of CERCLA or other
8 applicable statute, regulations or guidance within ninety (90)
9 Working days of resolution of the dispute, in accordance with the
10 method of payment set forth in Section XX(F.).

11 (G.) Initiation of the Dispute Resolution procedure itself
12 will not postpone the Defendants' obligations under this Decree
13 with respect to the disputed issue, or stay the accrual of
14 stipulated penalties. Defendants are not required to pay, and
15 Plaintiff agrees not to demand payment of, penalties accrued
16 until completion of the Dispute Resolution process.

17 (H.) Defendants may dispute the underlying compliance issue
18 that gives rise to stipulated penalties, but once EPA or COE, as
19 appropriate, (in the event Defendants do not initiate dispute
20 resolution proceedings with the Court) or the Court (in the event
21 Defendants do initiate dispute resolution proceedings with the
22 Court) has determined that there has been a violation that gives
23 rise to stipulated penalties, the application or amount of
24 penalties is not subject to dispute resolution.

25 (I.) After the Dispute Resolution process has ended, and if
26 the dispute has been resolved in favor of the United States, if

CONSENT DECREE - 68 -

1 Defendants refuse to implement Plaintiff's decision, Plaintiff
2 may elect to perform the Work. If Plaintiff does perform the
3 Work after Defendants' refusal, stipulated penalties will
4 continue to accrue for the life of the Decree.

5
6 XXII. FORCE MAJEURE

7 (A.) Defendants shall perform all the requirements of this
8 Consent Decree according to the terms of this Decree and
9 referenced supporting documents or any modification thereto, and
10 the approved Work Plans, unless such performance is prevented or
11 delayed by events which constitute a force majeure.

12 (B.) For the purposes of this Decree, a force majeure is
13 defined as any event arising from causes entirely beyond the con-
14 trol of Defendants or their contractors, subcontractors or con-
15 sultants, which delays or prevents performance. Neither economic
16 hardship nor increased costs shall be considered an event beyond
17 the control of Defendants, and these events shall not trigger the
18 force majeure clause.

19 (C.) Defendants have the burden of proving by clear and
20 convincing evidence that any delay is or will be caused by events
21 entirely beyond their control and that the duration of the delay
22 requested is necessary.

23 (D.) In the event of a force majeure, the time for perfor-
24 mance of the activity delayed by the force majeure shall be ex-
25 tended for the minimum time necessary to allow completion of the
26 delayed activity, but in no event longer than the time period of
the delay attributable to the force majeure. The time for per-

1 formance of any activity dependent on the delayed activity shall
2 be similarly extended. Plaintiff will determine whether require-
3 ments are to be delayed and the time period granted for any
4 delay. Defendants shall adopt all practicable measures to avoid
5 or minimize any delay caused by a force majeure.

6 (E.) In the event of a force majeure, Defendants shall
7 orally notify Plaintiff's Project Coordinator no later than
8 forty-eight (48) hours after Defendants become aware of the force
9 majeure, and shall notify EPA and the Department of Justice in
10 writing within fourteen (14) calendar days after discovery of a
11 force majeure. The written notification shall describe the
12 alleged force majeure, the anticipated length of the delay, and
13 any measures Defendants are taking to mitigate the event or the
14 delay.

15 (F.) Failure of Defendants to comply with the written
16 notification requirements of this Section shall result in
17 automatic forfeiture of any right to claim a force majeure delay.

18 XXIII. ADDRESSES FOR NOTICE; SERVICE OF PROCESS

19 Notification to or communication among the parties shall be
20 addressed as follows:

21 As to EPA:

22 Remedial Project Manager, South Bay Asbestos Area
23 Toxics and Waste Management Division, Superfund Program
24 United States Environmental Protection Agency
25 215 Fremont Street
26 San Francisco, California 94105

1 As to the Department of Justice:

2 Section Chief
3 Environmental Enforcement Section
4 Environment and Natural Resources Division
5 United States Department of Justice
6 P.O. Box 7611
7 Washington, D.C. 20044-7611

8 As to the U.S. Army Corps of Engineers:

9 John Eft
10 District Counsel
11 San Francisco District
12 U.S. Army Corps of Engineers
13 211 Main Street
14 San Francisco, California 94105

15 As to the United States Fish and Wildlife Service:

16 Field Supervisor
17 Fish and Wildlife Enhancement Field Office
18 U.S. Fish and Wildlife Service
19 2800 Cottage Way, Room E-1803
20 Sacramento, California 95825

21 As to the City:

22 ~~DEP.~~ MOLLY EDENT
23 City Attorney
24 151 West Mission Street
25 San Jose, California 95110

26 and

City Manager's Office
801 N. 1st Street
San Jose, California 95110

As to Raisch:

Mr. Lawrence J. Klamecki
Vice President
A. J. Raisch Paving Co.
96 N. 3rd Street, Suite 680
San Jose, California 95113

XXIV. MODIFICATION

There shall be no modification of this Consent Decree

1 without written approval of all parties to this Decree and entry
2 by the Court.

3
4 XXV. ADMISSIBILITY OF DATA

5 In the event that the Court is called upon to resolve a
6 dispute concerning implementation of this Consent Decree, the
7 parties waive any evidentiary objection to the admissibility into
8 evidence of sampling data gathered, generated, or evaluated
9 pursuant to, and in compliance with, this Decree.

10 XXVI. COMMUNITY RELATIONS

11 Defendants shall cooperate with Plaintiff and the State of
12 California in providing information to the public. As requested
13 by Plaintiff or the State, Defendants shall participate in the
14 preparation of information disseminated to the public and in
15 public meeting(s) which may be held or sponsored by Plaintiff or
16 the State to explain activities at or concerning the site.

17 XXVII. PUBLIC PARTICIPATION

18 (A.) Plaintiff will provide for public notice and partici-
19 pation concerning this Consent Decree upon its lodging with the
20 United States District Court as a proposed settlement in this
21 matter in accordance with 28 U.S.C. § 50.7 and 42 U.S.C. §
22 9622(d)(2).

23 (B.) Plaintiff will provide persons who are not parties to
24 the proposed settlement with the opportunity to file written com-
25 ments during at least a thirty (30) day period following such
26 notice. Plaintiff will file with the Court a copy of any com-
ments received and its responses to such comments.

CONSENT DECREE - 72 -

1 (C.) After the closing of the public comment period, Plain-
2 tiff will review all comments and determine whether the comments
3 disclose facts or considerations which indicate that the proposed
4 Decree is inappropriate, improper or inadequate, and therefore
5 that it should be modified.

6 (D.) If a modification is deemed necessary by Plaintiff
7 based on public comment, Plaintiff will notify Defendants of such
8 proposed modification(s). Any proposed modification to this
9 Decree shall be subject to written approval of all parties in
10 accordance with Section XXIV.

11 XXVIII. CONSISTENCY WITH THE NCP

12 The RD/RA, if performed in full accordance with the require-
13 ments of this Consent Decree, is consistent with the provisions
14 of the NCP, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605.

15 XXIX. INDEMNIFICATION OF THE UNITED STATES

16 Notwithstanding any approvals which may be granted by the
17 United States or other government entities, Defendants agree to
18 indemnify the United States, its officials, employees, agencies,
19 and contractors from any liability which may arise from
20 Defendants' acts or omissions relating to the execution of the
21 Work required by this Decree or compliance with this Decree.
22 Defendants also agree to assume any liability arising from or
23 relating to their acts or omissions or the acts or omissions of
24 any of their contractors, subcontractors, or any other person
25 acting on their behalf in the performance or nonperformance of
26 the Work.

1
2 XXX. OTHER CLAIMS

3 (A.) With respect to any person, firm, partnership, or cor-
4 poration not a signatory to this Decree, nothing in this Consent
5 Decree shall constitute or be construed as a covenant not to sue,
6 or as release from any claim, cause of action, or demand in law
7 or equity.

8 (B.) This Consent Decree does not constitute a
9 preauthorization of funds under CERCLA Section 111(a)(2), 42
10 U.S.C. § 9611(a)(2).

11 (C.) In consideration of entry of this Consent Decree,
12 Defendants agree not to make any claims pursuant to CERCLA
13 Section 112 or Section 106(b)(2), 42 U.S.C. §§ 9612, 9606(b)(2),
14 or any other provisions of law directly or indirectly against the
15 Hazardous Substances Superfund, or make other claims against the
16 United States for costs expended in connection with this Consent
17 Decree.

18 XXXI. CONTINUING JURISDICTION

19 The Court specifically retains jurisdiction over both the
20 subject matter of and the Parties to this action until
21 termination of this Consent Decree in accordance with Section
22 XXXIV for the purposes of issuing such further orders or
23 directions as may be necessary or appropriate to construe,
24 implement, modify, enforce, terminate, or reinstate the terms of
25 this Consent Decree or for any further relief as the interest of
26 justice may require.

CONSENT DECREE - 74 -

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2 XXXII. SECTION 121(C) PERIODIC REVIEW

3 A. To the extent required by Section 121(c) of CERCLA, 42
4 U.S.C. § 9621(c), and any applicable regulations, EPA shall
5 review the remedial action at the Site at least every five (5)
6 years after the entry of this Consent Decree to assure that human
7 health and the environment are being protected by the Remedial
8 Action implemented hereunder. Until such time as EPA certifies
9 the completion of the Remedial Action pursuant to Section
10 XXXIV(A.), Defendants shall conduct the requisite studies,
11 investigations, or other response actions as determined necessary
12 by EPA in order to permit EPA to conduct the reviews of this
13 remedial action required by Section 121(c) of CERCLA.

14 B. Defendants shall be provided with an opportunity to
15 confer with EPA on any additional work proposed by EPA during the
16 5-year review process and to submit written comments for the
17 record during public comment period. After the period for
18 submission of written comments is closed, the Regional
19 Administrator for EPA Region IX shall determine in writing
20 whether further response action is appropriate.

21 XXXIII. EFFECTIVE DATE

22 (A.) Plaintiff anticipates that it will issue a ROD
23 amendment prior to the entry of this Decree that is in accordance
24 with the Work to be performed in this Consent Decree. Plaintiff
25 will not move to enter the Decree until the ROD amendment has
26 been issued and Defendants have had an opportunity to review it

1 for consistency with the Work to be performed pursuant to this
2 Decree.

3 (B.) This Decree shall be effective upon the date of its
4 entry by the Court.

5 XXXIV. CERTIFICATION OF WORK AND TERMINATION OF DECREE

6 (A.) Certification of Completion of RD/RA Work

7 (1.) When the Defendants determine that they have
8 completed all Work required by the RD/RA Work Plans and Section V
9 of this Decree, they shall submit to EPA a Notice of Completion
10 and a Final Remedial Action Report as required by Section
11 V(F.) (3.). The Notice and Final Remedial Action Report shall
12 summarize the Work performed, the results of the confirmation
13 sampling and analysis and any supporting documentation.

14 (2.) EPA will review the Notice and Remedial Action
15 Report and any other relevant information. EPA will issue a
16 Certification of Completion of Remedial Action upon its
17 determination that (a) Defendants have satisfactorily completed
18 the RD/RA Work in accordance with the terms of this Decree, the
19 ROD, CERCLA, and the NCP, and have submitted all the required
20 reports and other documentation required by this Consent Decree
21 (b) no further Work is necessary to complete the RD/RA Work; and
22 (c) all stipulated penalties incurred in performing the RD/RA
23 Work, past and oversight costs required pursuant to Section XV,
24 and any other monies required to be paid under this Consent
25 Decree (except such penalties or other debts to the United States
26

1 that the City has incurred or may incur in performing the R/M
2 Work) have been paid in full by Defendants.

3 (3.) If EPA determines that the RD/RA Work has not
4 been satisfactorily completed, it will notify Defendants in
5 writing of its determination and set out what must be done to
6 complete the Work.

7 (4.) In the event that Defendants dispute EPA's
8 determination pursuant to subsection (A.) (3.) above, Defendants
9 may invoke the Dispute Resolution procedure as set forth in
10 Section XXI.

11 (5.) EPA recognizes that certain aspects of the
12 Restoration and Mitigation Work required by Section VI of this
13 Decree cannot begin until all Remedial Action Work has been
14 completed. Therefore, EPA will certify the completion of the
15 Remedial Action as soon as practicable following submittal of the
16 Final Remedial Action Report. EPA presently anticipates that if
17 no additional work is necessary for completion of the Remedial
18 Action, it should be able to review the Final Remedial Action
19 Report and certify the remedy within 90 days of receipt of the
20 Remedial Action Report. In the event that EPA has not certified
21 the remedy and has not required additional work a) within 6
22 months of receipt of the Final Remedial Action Report or b)
23 within 3 months of receipt of a notice of completion of
24 additional work, Defendants may invoke the Dispute Resolution
25 procedure as set forth in Section XXI.

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CONSENT DECREE - 77 -

1 (B.) Certification of Completion of Restoration and
2 Mitigation Work

3 (1.) When the City determines that it has completed
4 all Restoration and Mitigation Work required by the R/M Work
5 Plans and Section VI of this Decree (including the monitoring and
6 maintenance period required by Section VI(G.), it shall submit to
7 COE a Notice of Completion and a Final R/M Report as required by
8 Section VI(E.)(8.)(b.)(iii). The Notice and Final R/M Report
9 shall summarize the Restoration/Mitigation Work performed, the
10 results of inspection and monitoring activities, and any
11 supporting documentation.

12 (2.) COE, FWS and EPA will review the Notice and Final
13 R/M Report and any other relevant information. COE will issue a
14 Certification of Completion of Restoration and Mitigation upon
15 the determination of COE and FWS (in consultation with EPA) that
16 (a) Defendants have satisfactorily completed the R/M Work in
17 accordance with the terms of this Decree and have submitted all
18 required reports and other documentation as required by this
19 Consent Decree; (b) no further Work is necessary to complete the
20 R/M Work; and (c) that the City has paid in full all stipulated
21 penalties and any other debts to the United States incurred in
22 performing the Restoration and Mitigation Work.

23 (3.) If COE (in consultation with FWS and EPA)
24 determines that the R/M Work has not been satisfactorily
25 completed in accordance with the requirements of the R/M Plans
26 and Section VI of this Decree, it will notify the City in writing

1 of its determination and set out what must be done to complete
2 the R/M Work.

3 (4.) In the event that the City disputes COE's deter-
4 mination pursuant to subsection (B.)(3.) above, the City may
5 invoke the Dispute Resolution procedure as set forth in Section
6 XXI.

7 (5.) In the event that COE has not certified the
8 remedy and has not required additional work a) within 6 months of
9 receipt of the Final R/M Report, or b) within 3 months of receipt
10 of a notice of completion of additional work, the City may invoke
11 the Dispute Resolution procedure as set forth in Section XXI.

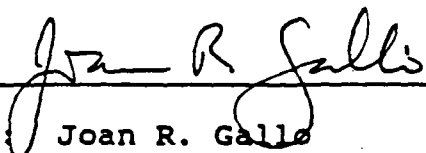
12 (C.) Termination of the Decree. Except for such specific
13 continuing obligations as are set forth in this Decree, this
14 Decree shall terminate upon EPA's notice to the Court that (a.)
15 EPA has certified the completion of the Remedial Action in
16 accordance with subsection (A.) of this Section; and (b.) COE has
17 certified the completion of the Restoration and Mitigation Work
18 in accordance with subsection (B.) of this Section.

19 XXXV. SECTION HEADINGS

20 The section headings set forth in this Decree are included
21 for convenience of reference only and shall be disregarded in the
22 construction and interpretation of any of the provisions of this
23 Decree.

1
2 By its signature below, San Jose consents to this Decree as
3 hereby given.
4
5

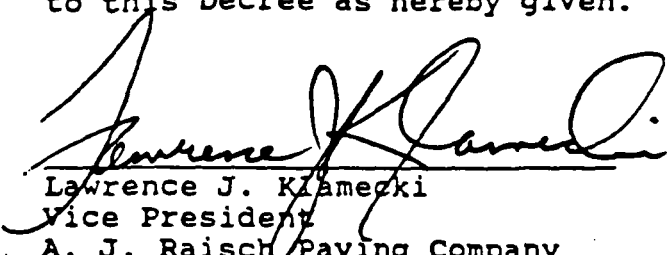
6 CITY OF SAN JOSE

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8 
9 By: Joan R. Gallo
City Attorney

DATE: August 6, 1990

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CONSENT DECREE - 80 -

1 By its signature below, A. J. Raisch Paving Company consents
2 to this Decree as hereby given.
3

4 
5 Lawrence J. Klamecki
6 Vice President
7 A. J. Raisch Paving Company

DATE:

July 24, 1990

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CONSENT DECREE - 81 -

By their signatures below, the parties consent to this Decree as hereby given.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

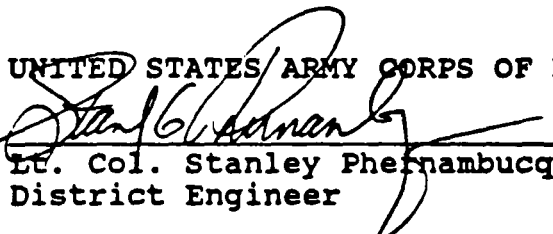

Daniel W. McGovern
Regional Administrator
Region 9

DATE: 9.4.90


Edward E. Reich, Deputy
Assistant Administrator
Office of Enforcement

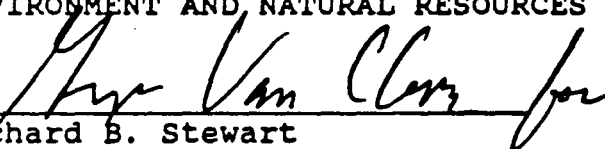
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UNITED STATES ARMY CORPS OF ENGINEERS

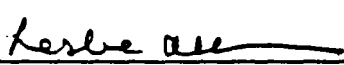

Lt. Col. Stanley Phernambucq
District Engineer

DATE: 14 Feb 91

UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION


Richard B. Stewart
Assistant Attorney General

DATE: 3/29/91

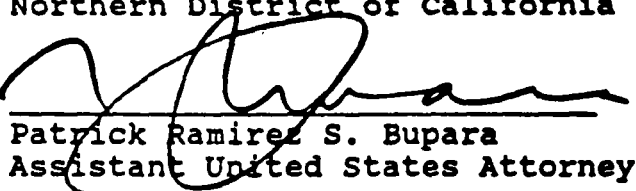

Leslie Allen
Trial Attorney
Environmental Enforcement Section

DATE: February 13, 1991

OFFICE OF THE UNITED STATES ATTORNEY


WILLIAM T. MCGIVERN, JR.
United States Attorney
Northern District of California

DATE: June 7, 1991


Patrick Ramirez S. Bupara
Assistant United States Attorney

DATE: June 7, 1991

CONSENT DECREE - 82 -

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3 ENTERED this ____ day of _____, 1990.
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UNITED STATES DISTRICT JUDGE

CONSENT DECREE - 83 -